SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 358

LAUREANO MAYSONET GUZMAN, PETITIONER,

vs.

RAMON RUIZ PICHIRILO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 15, 1961

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5650

RAMON RUIZ PICHIRILO, Respondent, Appellant,

v.

LAUREANO MAYSONET GUZMAN, Libellant, Appellee.

Appendix to Appellant's Brief

[fol. 1]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Admiralty No. 39-58

LAUREANO MAYSONET GUZMAN, Libellant,

v.

M/V "CARIB", her engines, boilers, appliances, tackle, furniture, etc. and RAMON RUIZ PICHIRILO, Respondents.

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[fol. 2]

LIBEL—Filed December 5, 1958

To the Honorable, the Judges of Said Court:

The libel and complaint of Laureano Maysonet Guzman against the M/V "CARIB", her engines, boilers, appliances, tackle, furniture, etc. and against Ramon Ruiz Pichirilo, owner, operator and/or charterer of the M/V "CARIB", in an action of tort, civil and maritime, alleges on information and belief, as follows:

First: That at all the times hereinafter mentioned, the libellant, Laureano Maysonet Guzman, was and now is a resident and citizen of the Commonwealth of Puerto Rico and the United States of America.

Second: That the M/V "CARIB", is now, or during the pendency of process herein, will be within the District of Puerto Rico and within the jurisdiction of this Honorable Court.

Third: That upon information and belief and at all the times hereinafter mentioned, the respondent, Ramon Ruiz Pichirilo is a citizen and resident of the Dominican Republic.

Fourth: That upon information and belief the respondent, Ramon Ruiz Pichirilo owned the M/V "CARIB".

Fifth: That upon information and belief the respondent, Ramon Ruiz Pichirilo, operated, controlled, and manned the M/V "CARIB".

[fol. 3] Sixth: That upon information and belief the M/V "CARIB" flew the flag of the Dominican Republic.

Seventh: That on or about the 15th day of October, 1957, the M/V "CARIB" was in the port of San Juan, Puerto Rico.

Eighth: That on or about the 15th day of October, 1957, the libellant was in the employ of an independent stevedoring contractor, who had contracted to handle the cargo on the aforesaid M/V "CARIB".

Ninth: That on or about the 15th day of October, 1957, while the libellant was performing his duties on the dock alongside the respondent's vessel, he was caused to be seriously and severely injured when a boom of the vessel broke and struck him.

Tenth: That the respondents were under a duty to furnish the libellant with a safe place to work; a safe and seaworthy vessel appurtenances, appliances and crew; to maintain the vessel, its appurtenances, appliances and crew in a safe and seaworthy condition; to act in a reasonable manner with regard to the safety of the libellant.

Twelfth: That the respondents, their agents, servants, and/or employees were negligent in the following respects among others: in failing to equip the vessel with seaworthy appurtenances and equipment, especially the boom and its fastenings; in failing to inspect the boom and its fastenings; in allowing the boom and its fastenings to become and remain in a worn, defective and broken condition; in failing to replace the boom and its fastenings with proper and safe equipment fit for its intended purpose; in failing to warn the libellant of the dangers to be encountered; in failing to provide the libellant with a safe place to work; and in otherwise failing to exercise due care and caution in the premises.

Thirteenth: That the aforesaid occurrence was caused solely by the fault of the respondents without any fault of the libellant contributing thereto.

[fol. 4] Fourteenth: That the libellant came under the care of the State Insurance Fund of Puerto Rico and was given his final award on March 6, 1958.

Fifteenth: That by reason of the foregoing, the libellant sustained serious and severe injuries to his head, arms, legs, body and nervous system, some of which upon information and belief, will be permanent; that he was compelled to expend divers sums of money and incur liability to cure himself of said injuries and to alleviate the pain and suffering; upon information and belief, he will be compelled to make such further expenditures in the future; that the libellant has lost and will lose in the future sums of money which he otherwise would have earned.

Sixteenth: And solely by reason of the aforesaid the libellant was damaged in the sum of One Hundred Thousand ($100,000.00) Dollars.

Seventeenth: All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays:

1.—That process *in rem* may issue in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, against the said vessel, M/V "CARIB", her engines, boilers, apparel, tackle, furniture, etc., and that all persons having or claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid;

2.—That process *in personam* may issue in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, against the respondent Ramon Ruiz Pichirilo, owner, operator and/or charterer of the vessel, M/V "CARIB", and that said respondent may be cited to appear and answer all and singular the matters aforesaid; and in the event that the said

[fol. 5] respondent cannot be found in this District or within this jurisdiction, then all goods, chattels and effects belonging to it within this District or within this jurisdiction, and in particular the vessel, M/V "CARIB" and her engines, boilers, apparel, tackle, furniture, etc. be attached in the amount of One Hundred Thousand ($100,000.00) Dollars, the sum sued for in this Libel, with interest, costs and disbursements of the libellant; and

3.—That this Honorable Court may be pleased to decree to the libellant his damages with interest and costs, and that the said vessel, M/V "CARIB", her engines, boilers, apparel, tackle, furniture, etc., may be condemned and sold to pay the same, and that the libellant may recover his damages from said respondent; and

4.—That the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

Stanley L. Feldstein, Harvey B. Nachman, Proctors for Libelant, Maritime Bldg. 305, P. O. Box 2544, San Juan, Puerto Rico, By: Harvey B. Nachman.

IN UNITED STATES DISTRICT COURT

MOTION—Filed December 23, 1958

To the Hon, Clemente Ruiz Nazario, Judge of the aforesaid Court.

Comes now Luis M. Bordas as duly authorized agent of Ramon Ruiz Pichirilo by his undersigned attorneys, and under oath states, pleads and alleges:

1. That he has been duly authorized to appear generally in this cause by Ramon Ruiz Pichirilo.

[fol. 6] 2. That Ramon Ruiz Pichirilo is the owner of the M/V "CARIB", as appears from the vessel registry.

3. That Ramon Ruiz Pichirilo as such owner, hereby appears and claims said vessel and all its appliances, appurtenances, tackle, furniture, etc.

4. That the named owner together with this Motion deposits a bond in the sum of $20,000.00 said bond to respond for any judgment, together with costs, either in this Court or any Appellate Court, rendered against the said M/V "CARIB" and/or Ramon Ruiz Pichirilo.

5. Said Ramon Ruiz Pichirilo by this general appears [sic] does submit to the jurisdiction of the United States District Court for the District of Puerto Rico.

Wherefore, Respondent respectfully moves that the attachment on said vessel and all its appliances, appurtenances, tackle, furniture, etc., be lifted and the same be delivered to his possession.

San Juan, Puerto Rico, this 22 day of December, 1958.

Isaias Rodriguez Moreno, Elmer Toro Lucchetti.

Served with copy and consented to:

By: Stanley L. Feldstein, One of the Proctors for the Libellant.

So ordered:

Clemente Ruiz Nazario, United States District Judge.

December 23, 1958.

IN UNITED STATES DISTRICT COURT

BOND FOR DISCHARGE OF ATTACHMENT—
Filed December 23, 1958

Know All Men by These Presents, that I, Luis Manuel Bordas, of Santurce, Puerto Rico, as Individual Surety, [fol. 7] is held and, firmly bound unto Laureano Maysonet Guzman, as Libellant, in the penal sum of Twenty Thousand Dollars ($20,000.00), to which payment well and truly to be made I hereby bind myself, my heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such that, whereas said Libellant has brought an action against the M/V "CARIB", her engines, boilers, appliances, tackle, furni-

ture, etc., said action being returnable to the United States District Court for the District of Puerto Rico, on the day of 1958, at demanding One Hundred Thousand Dollars ($100,000.00), damages, the writ being dated at San Juan, P. R., and signed by Mary Aguayo, as c' k, U. S. District Court and Stanley L. Feldstein and Harvey B. Nachman, as Proctors for Libellant, and by direction of said writ an attachment has been placed upon the M/V "CARIB", her engines, boilers, appliances, tackle, furniture etc.

Now, therefore, if the M/V "CARIB", shall be assessed any judgment that may be recovered against it in such action not exceeding the amount of Twenty Thousand Dollars ($20,000.00), or in default of such payment, shall pay to the officers having execution issued on such judgment, on demand, the actual value of the interest not exempt from attachment and execution of M/V "CARIB", in said attached property, at the time of such attachment, not exceeding said amount of Twenty Thousand Dollars ($20,000.00), then this bond shall be void, but otherwise to remain in full force and effect.

Signed and dated at San Juan, Puerto Rico, this 23 day of Dec. 1958.

Luis Manuel Bordas (Individual Surety).

[fol. 8]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 9, 1959

To the Hon. Clemente Ruiz Nazario, Judge of the Aforesaid Court:

The answer of respondents to the libel of Laureano Maysonet Guzman, respectfully represents, upon information and belief, as follows:

1.—Respondent Ramon Luis Pichirilo denies the allegations contained in the First Article of the libel.

2.—Admitted.

3.—Admitted.

4.—Admitted.

5.—Respondent Ramon Luis Pichirilo denies the allegations contained in the Fifth Article of the libel, and alleges that at all times hereinafter mentioned the M/V "CARIB" her engines, boilers, appliances, tackles, furniture, etc., had been chartered by Bordas & Co., a firm of San Juan, P.R., and the entire place of work was under the control of said Bordas & Co.

6.—Admitted.

7. Respondent Ramón Luis Pichirilo denies the averments contained in the Seventh Article of the libel and demands proof thereof.

8.—Respondent Ramon Luis Pichirilo denies the allegations and averments contained in the Eighth Article of the libel.

9.—Respondent Ramon Luis Pichirilo denies the averments and allegations of the Ninth Article of the libel. The answering respondents is without knowledge or information sufficient to form a belief either as to the exact facts of the accident or the injuries sustained by libellant. He accordingly demands proofs of the matter alleged in the Ninth Article of the libel.

[fol. 9] 10.—Respondent Ramon Luis Pichirilo denies the averments and allegations contained in the Tenth Article of the libel. He alleges that insofar as the libellant is concerned all duties were complied with and it specifically denies that the place of work was not safe and also denies that the vessel was unseaworthy in general or in with respect to any portion of appliance. The vessel herein involved and all appliances and portions thereof were strong, staunch and seaworthy.

11.—Libel contains no Article under this number.

12.—Respondent Ramon Luis Pichirilo denies all the averments and allegations contained in Article Twelve of the libel and demands proof thereof.

13.—Respondent Ramon Luis Pichirilo denies the allegations of Article Thirteen of the libel and demands proof thereof.

14.—Respondent denies the allegations of the Fourteenth Article of the libel, and demands proof thereof.

15.—Respondent denies the allegations of the Fifteenth article of the libel and demands proof thereof.

16.—Respondent denies the allegations of the Sixteenth Article of the libel and demands proof thereof.

17.—Respondent denies the allegations of the Seventeenth Article of the libel except that he admits that this cause is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

As a First Complete Defense to the Libel

18.—That if libellant suffered any injuries as alleged in the libel, said injuries were caused in whole or in part by libellant's own negligence and were not caused or contributed to in any manner by any negligence of this respondent.

[fol. 10]

As a Second Complete Defense to the Libel

19.—That the injuries to the libellant, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to the libellant at and before the said injury and all of said risks, dangers and hazards had been assumed by the libellant.

As a Third Complete Defense to the Libel

20.—That the injuries and disability if any, suffered by libellant must have been already properly compensated if libellant has been already cared for by the State Insurance Fund of Puerto Rico and given his final award therefrom, as alleged in Article Fourteenth of the libel.

As a Fourth Complete Defense to the Libel

21.—That at all times hereinafter mentioned the M/V "CARIB", her engines, boilers, appliances, tackles, furniture, etc., had been chartered by Bordas & Co. a firm of San Juan, Puerto Rico and the entire place of work was under the control of said Bordas & Co.

Wherefore, respondent prays that libel herein be dismissed with costs and for such other and further relief as law and justice may require.

San Juan, P.R., this 5th day of January 1959.

Isaias Rodriguez Moreno, Elmer Toro Lucchetti,
Proctors for Respondents.

[fol. 12]

TRANSCRIPT OF TRIAL

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LAUREANO MAYSONET GUZMAN the libellant, appeared as a witness on his own behalf and upon being examined testified as follows:

• • • • • • • •

[fol. 12a] Mr. Rodriguez: I just want to know if the records show that Bordas had State Insurance Fund Compensation?

Mr. Nachman: I concede that. I am not suing Bordas and Company.

• • • • • • •

[fol. 39] JOSE LORA, a witness called by and on behalf of Libelant, after having been first duly sworn by the Notary Public, was examined and testified as follows:

Direct examination.

Questions by Mr. Nachman:

Q. What is your name?
A. Jose Lora.
Q. What is your occupation?
A. Master of a vessel.

Q. Where do you live?
A. Ciudad Trujillo, Dominican Republic.
[fol. 40] Q. What ship are you the master of?
A. The CARIB.
Q. What flag does the CARIB fly?
A. Dominican.
Q. By whom are you employed?
A. Ramon Ruiz Pichirilo.
Q. Were you master of the CARIB on October 15, 1957?
A. Yes, sir.
Q. Where was the ship on that date, if you remember?
A. At the Isla Grande pier.
Q. In what pier?
A. Here in San Juan, at Isla Grande.
Q. And what was the ship doing at that time at that pier?
A. Unloading.
Q. What were you unloading?
A. Corn.
Q. On that date, did any accident occur on board the ship?
A. Yes, sir.
Q. What happened?
A. Well, we were unloading, and suddenly the boom fell on the side with a sling load of ten bags of corn. This was because the shackle which holds the block opened. It was a new shackle; and when it opened, well the boom fell on the side with a sling load of ten bags of corn.
Q. Did you see this happen?
A. Yes, sir. I am always around because I am the one in charge of dispatching the corn.
Q. And did anyone get hurt as a result of this?
A. Well, yes, there was a fellow there, an employee of Bordas & Compañía, who was refilling the bags with the corn that had spilled on deck, and suddenly I saw that the man stayed more or less like this. I don't know. I don't know what touched him. Something touched him but I don't know what it was.
Q. And what happened to him after that?
A. To this gentleman?

Q. Yes.

A. They took him to the clinic.

[fol. 47] Q. Do you know the name of that man?

A. No, sir, I don't remember his name.

Q. Did you make out an accident report on this?

A. No, sir; of course, I didn't fill out any report. He was not my employee.

Q. Did you report the fact to anyone?

A. Well, of course, Bordas & Compañía; they hospitalized him.

Q. Did you fix the shackle after the accident?

A. No, I didn't fix it. It was not fit. I put a new one on. It was not fit for anything else.

* * * * * * *

[fol. 49] Luis Manuel Bordas a witness called by and on behalf of the respondent, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rodriguez:

Q. Please state your name?

A. Luis Manuel Bordas.

Q. What is your capacity with Bordas and Company, Inc.? Your relation, I mean?

A. I am Director-Partner of the concern, Bordas and Company, of San Juan, Puerto Rico.

Q. What are the main functions of that concern?

A. We are engaged in the import and export business; loading and unloading vessels sometimes; and shipping.

Q. What else?

A. And shipping.

Q. Among what areas do you conduct your business? Around the Caribbean?

A. Around the Caribbean area.

Q. Do you know Mr. Laureano Maysonet?

A. I saw Laureano Maysonet yesterday in Dr. Murphy's office.

[fol. 50] Q. Before that?

A. Before that I never had a chance to see him.

Q. You were served two days ago with a subpoena to bring some records with you, in relation to the work performed by Mr. Laureano Maysonet on behalf of your company? Do you have them with you?

A. Well, I brought in a card that is kept for all the casual workers on the piers, in order to keep a record of the hours worked and the Social Security docket. I have brought in that card, and according to those records Mr. Laureano Maysonet Guzman worked in our company in the last part of 1957, from September to October; to be exact, from September 17 to October 15, 1957, the day that he quit the work due to the accident.

Q. In other words, prior to the accident, Mr. Maysonet only worked for your company for two months?

A. No, he worked for only one month, as an occasional worker.

Q. He had never worked before, with Bordas and Company?

A. He has never been a permanent worker, and he never worked before that date, that the record shows.

Q. And he was being paid, as it shows, $1.00 an hour?

A. His work on those days was coopering cargo, sewing broken bags, and he was paid $1.00 an hour, that's all.

The Court: That's Identification 3 for respondent. Have it marked.

(Record of libellant's work was marked Identification 3 for Respondent.)

Q. What is this I am showing you?

A. This is a record that is kept for all the occasional workers on the piers, stating the Social Security number.

Q. Which is what number for Mr. Laureano Maysonet?

A. Laureano Maysonet, his Social Security number is 582-40-8162 1957. And here is kept the number of hours, the amount that is deducted for the Social Security for [fol. 51] account of the employer, the total number of hours, and that's all.

* * * * * * *

Q. Now, do you know Mr. Ruis Pichirilo?

A. Yes.

Q. Will you please state your connection with Ruiz Pichirilo in this case?

A. He has been a business relation of ours for many years. We have been managing and operating the "CARIB" for around five years. He lives in the Dominican Republic.

Q. He lives in the Dominican Republic?

A. He is from the Dominican Republic and lives there. He has not been able to get out of the country for the last two years.

The Court: Why?

A. I would rather not say.

The Court: I am interested in knowing, if you know?

A. It would be for political reasons.

The Court: But still he owns this boat?

A. But he is not allowed to leave the country.

The Court: The boat leaves the Dominican Republic to come to Puerto Rico, but he can not travel?

A. But he can not travel, and his captain's papers were cancelled.

Q. What arrangement do you have with him for operating this boat?

A. Well, I am paying him $200.00 a month.

Q. For what?

A. And I take care of all the expenses, insurance, payrolls, etc., of the boat.

Q. When you say you take care of all the expenses, what do you mean by that?

A. I mean paying the payrolls, the captain's salary, all the payrolls of the vessel, the food of the crew, the fuel, the maintenance, the repair, the dry docking, the insurance, the port charges, and all the expenses that go with the operation of a vessel.

Q. Mr. Pichirilo does not pay one cent toward those expenses?

A. He does not pay one cent.

[fol. 52] Q. And you pay Mr. Pichirilo that $200.00 a month for the chartering of this boat?

A. I pay $200.00 a month.

Q. For the chartering?

A. For the open boat charter.

Q. And you have exclusive control of everything, as to the boat?

The Court: Mr. Rodriguez Moreno you were complaining of leading questions. I believe you have not asked this witness a single question that wasn't leading, and it is the duty of the Court to see that the proper procedure is followed here.

Mr. Rodriguez: I am sorry.

The Court: It is worse for your case, because I can not give any credit to a witness answering leading questions because the attorney is the one that is testifying.

Mr. Rodriguez: I am sorry, Your Honor.

The Court: You have been insisting. This witness never mentioned anything about chartering the vessel, and you insisted on chartering, chartering—and then he had to say chartering.

Mr. Rodriguez: I was trying to get the terms commonly used.

The Court: No, he may be simply an agent for Pichirilo because he is in that situation that he can not leave the Dominican Republic, and they are good friends, and he says as a favor to Pichirilo we will do this and that: and another thing is a charter party, a contractual relation of a different nature.

Mr. Rodriguez: That's exactly what I asked, that he says he pays the crew, maintenance, etc. I am sorry if the question is leading. It isn't my intention to ask leading questions.

The Court: It may not be your intention, but you are doing it.

Q. How much did you state you pay a month to Mr. Ruiz Pichirilo?

A. $200.00 a month.

[fol. 53] Q. How do you pay? What sort of payment do you make, for the expenses that you have in the operation of this boat?

A. I pay the crew, the master makes up the payroll of the crew, every 15 days, and we draw a check in the name of the master. Then the master pays the seamen. We also give him the money for the rations or the feeding of the men. Also the operating expenses of the vessel are paid by us. That chartering is different. Let me explain what a charter party is.

The Court: You may go ahead.

A. When a vessel is chartered, usually the owner of the vessel has to supply a vessel with insurance, with crew, with galley and food and everything. The only thing that the charterer pays is port charges and fuel for the intended voyages. That's the usual charter party. There are standard forms for that. But in this case it is a kind of charter, because it does not comply with the regular provisions of a charter party. I pay the seamen, food, repair, maintenance, drydocking; which in a regular charter party are excluded.

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Cross examination.

By Mr. Nachman:

XQ. Mr. Bordas, Captain Lora isn't your employee, is he?

A. Captain Lora was appointed by Ramon Ruiz Pichirilo, but he is under my orders and under my payroll. I pay him.

XQ. Do you pay him here, in San Juan?

A. Wherever he is. If he is here, I pay him. If he is in another port, I mail him or cable him the money.

XQ. In what currency do you pay him?

A. Sometimes in Colombian currency. Whatever currency of the port he is in.

[fol. 54] XQ. When the vessel is in San Juan, in what currency do you pay him?

A. In United States currency.

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XQ. Mr. Bordas, is Mr. Lora covered by the Fondo del Suguro del Estado?

A. He is not.

XQ. When this ship comes into San Juan, and registers with the Customs, who is listed as owner of the vessel?

A. Ramon Ruiz Pichirilo is listed as owner.

XQ. What flag does the vessel fly?

A. The Dominican Flag.

Mr. Rodriguez: Those things, Your Honor, were admitted in our answer.

XQ. You were present when Joseph Lora testified under oath in my office?

A. I was.

XQ. And you sat through the entire deposition?

A. I did.

XQ. Did you hear this question asked to Mr. Joseph Lora, "By whom are you employed"? And did you hear this answer, "Ramon Ruiz Pichirilo."

A. That's right.

XQ. This crew, does it sign articles aboard that ship?

A. No, they have to abide by the regulations of the Dominican Government, and according to those regulations the Captain of the vessel has to be appointed by a Dominican owner. It is a matter of technicality. Captain Lora can never say he is my employee, because he is flying under the Dominican flag on a Dominican schooner.

XQ. You are nowhere listed as owner of this vessel?

A. I am not.

Mr. Nachman: No further questions.

Mr. Rodriguez: No questions, Your Honor.

The Court: Is it true or not, Mr. Bordas, that the true owner of this steamship "CARIB" is Bordas and Company?

A. No, sir.

The Court: You say that under oath, that Bordas and Company is not the owner of the Steamship "CARIB"?

[fol. 55] A. No. We are controlling, operating and managing the vessel.

The Court: That's all.

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(Work record of libellant was admitted in evidence by stipulation and marked Exhibit 3 for Respondent.)

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COLLOQUY

Mr. Rodriguez: All right. That is all, Your Honor.

The Court: Then the respondent rests?

Mr. Rodriguez: Yes, Your Honor. Your Honor, we would like to file a legal memorandum, now that the case is finished, in this case based on the fact that Ramon Ruiz Pichirilo not having control of this boat is not liable in this case. We would like to, in other words—the question is whether Mr. Pichirilo had control of this boat, independently of Mr. Bordas' activities, and as to that fact we would like Your Honor to grant us 15 days to file this memorandum.

The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.

Mr. Rodriguez: No, the owner, not the operator. The operator is Bordas and Company.

The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat.

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[fol. 56]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

OPINION AND ORDER—Filed and Entered September 8, 1959

This action is now before the court after a trial on the merits.

I have given due consideration to the pleadings, the evidence adduced at the trial and the memoranda filed by the parties and find myself fully advised in the premises.

Libelant's evidence as to the happening of the occurrence was not in any way controverted by respondents, and it thus appears, from said controverted [sic] evidence,

(a) That about 3:15 P.M. on October 15, 1957 libelant Laureano Maysonet Guzman was aboard the M/V CARIB, sewing sacks, that suddenly the boom fell and struck him and he lost consciousness.

(b) That the shackle broke on the boom, causing the same to fall, strike a truck, bouncing off and hitting the libelant on the head.

The libelant was lawfully aboard the vessel, at the time of the accident as an employee of Bordas & Co. stevedoring contractor in charge of the unloading operations of the vessel.

The accident caused serious injuries to libelant. He was unconscious for a long period of time and was hospitalized from October 17 to November 22, 1957. He sustained a separation of the coronal suture of the skull; a fracture of the temporal bone, a fracture of the frontal bone, the bleeding from the nose being an indication of a fracture into the base of the skull. The force of the blow and the extent of the fractures caused a severe concussion to the brain, which has resulted in a post-concussion syndrome as manifested by the constant throbbing headaches, dizziness, tenderness and spasm of the cervical musculature.

On account of his youth (libelant is only 26 years old), this injury to the brain has caused and is likely to cause further irreparable damage to the libelant's psychological [fol. 57] adjustment to his injury, because of the emotional difficulty that a young man faces in not being able to provide a livelihood for his family.

Conservatively speaking, the damages suffered by this libelant are worth $30,000.00.

I have not the slightest doubt that the evidence has fully established that M/V CARIB was unseaworthy at the time of the occurrence.

See: *Crumady* v. *The J. H. Fisser*, 358 U. S. 423.

Respondents sole defense is that the owner of the vessel, defendant Ramon Ruiz Pichirilo had chartered the M/V

CARIB by a demise charter to Bordas & Co., that the latter had possession, command and navigation of the ship and was *pro haec vice* the owner of the vessel and, therefore, the liability for unseaworthiness of the vessel rests on Bordas & Co. and not on defendant Ruiz Pichirilo, citing in support of its said contention *Vitozi* v. *Balboa Shipping Co.*, 163 F. 2d (1 Cir.) 286.

But in Vitozi, supra, the defendant, produced a "copy of the demise charter party of the ship", which it was conceded was a true demise charter party under the rule laid down in *Reed* v. *United States*, 11 Wall. 591, 601, 20 L. Ed. 220. (See Footnote 1, at p. 287, 163 F. 2d.).

No such document or any other has been produced here by the defendant and all that appears from the evidence adduced at the trial, in connection with this defense, is the testimony of Mr. Luis Manuel Bordas, Director and Partner of Bordas & Co., who admitted that there was no charter, and that his company's relation with the vessel was "something like a charter but not a charter."

The Captain testified that he was not working for Bordas & Co. but for the owner Ramon Ruiz Pichirilo.

The evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter party to Bordas & Co.

[fol. 58] A decree for the libelant will be entered, awarding him damages in the amount of $30,000.00, plus costs.

Proctor for libelant is directed to submit, within a period of 15 days from the date of notice of this order, proposed findings of fact, conclusions of law and a form of decree, serving copy thereof to proctors for respondents, who shall have a like period to submit objections thereto.

It is so Ordered.

San Juan, Puerto Rico, September 8, 1959.

Clemente Ruiz-Nazario, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed and Entered October 16, 1959

1. Libellant has been at all times a resident and citizen of the Commonwealth of Puerto Rico.

2. The respondent, Ramon Ruiz Pichirilo was at all times mentioned in the libel a resident and citizen of the Dominican Republic.

3. The respondent Ramon Ruiz Pichirilo was at all times mentioned in the libel the owner in possession and control of the vessel M/V "CARIB".

4. On October 15, 1957 libellant Laureano Maysonet Guzman was employed aboard respondent's vessel as a longshoreman by Bordas & Co., stevedoring contractors.

5. At about 3:15 P. M. on said date, while he was sewing sacks aboard the M/V "CARIB" the boom fell and struck the libellant.

6. The boom fell because the shackle on the boom broke. The shackle and boom were not fit for their intended purposes.

7. The vessel was for the foregoing reasons unseaworthy.

[fol. 59] 8. As a result of the accident the libellant was rendered unconscious for a long period of time. He was hospitalized from October 17 to November 22, 1957. He sustained a separation of the coronal suture of the skull; a fracture of the temporal bone; a fracture of the frontal bone; he also bled from the nose which indicated a fracture into the base of the skull. The force of the blow and the extent of the fractures caused a severe concussion of the brain, which has resulted in a post concussion syndrome manifested by constant throbbing headaches, dizziness, tenderness and spasm of the cervical musculature.

9. The libellant has not been able to resume his former occupation or other common labor. He is unschooled and untrained for other work.

10. On account of his youth (26 years of age), this injury to the brain has caused and is likely to cause further irreparable damage to libellant's psychological adjustment to his injury, because of the emotional difficulty that a young man faces in not being able to provide a livelihood for his family.

11. I find that the libellant was not in any way guilty of negligence which contributed to the happening of the accident.

12. For his permanent disability, his pain, suffering and mental anguish both past and future and his loss of past and prospective earnings, I find that an award of $30,000.– is reasonable compensation.

Conclusions of Law

1. This Court has jurisdiction over the parties and subject matter herein.

2. The vessel M/V "CARIB" was unseaworthy at the time of the accident because the shackle and boom of said vessel were unfit for their intended purposes.

[fol. 60] 3. The libellant was not contributorily negligent.

4. A decree should be entered in favor of the libellant and against the respondents in the sum of $30,000.00.

Decree

The above entitled action came on for trial on April 15, 1959. The libellant appeared in person and by his proctors Stanley L. Feldstein and Harvey B. Nachman of San Juan, Puerto Rico and the respondents M/V "CARIB" and Ramon Ruiz Pichirilo appeared by Isaias Rodriguez Moreno and Elmer Toro Luchetti of San Juan, Puerto Rico and testimony having been offered and briefs having been filed and the Court having filed an Opinion and Order and Findings of Fact and Conclusions of Law in accordance with Admiralty Rule 46½, now pursuant thereto, it is hereby ordered, adjudged and decreed that the libellant herein, Laureano Maysonet Guzman, have and recover from the

respondents herein, M/V "CARIB" and Ramon Ruiz Pichirilo, the sum of $30,000.00, together with interests, costs and disbursements to be hereinafter taxed on notice.

San Juan, Puerto Rico, October 16, 1959.

Clemente Ruiz-Nazario, United States District Judge.

[fol. 63]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5650

RAMON RUIZ PICHIRILO, Respondent, Appellant,

v.

LAUREANO MAYSONET GUZMAN, Libellant, Appellee.

Appeal From the United States District Court for the District of Puerto Rico.

Before Woodbury, Chief Judge, and Maris* and Aldrich, Circuit Judges.

Seymour P. Edgerton, with whom Isaias Rodriguez Moreno, Hiller B. Zobel, W. C. Moffett and Bingham, Dana & Gould were on brief, for appellant.

Harvey B. Nachman, with whom Stanley L. Feldstein and Golenbock, Nachman & Feldstein were on brief, for appellee.

OPINION OF THE COURT—May 29, 1961

ALDRICH, *Circuit Judge.* This is a libel in rem against the M/V Caribe and in personam against her owner (here-

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* Sitting by designation.

inafter respondent) for personal injury sustained by libellant, a longshoreman employed by Bordas & Co., a stevedoring concern engaged in discharging the vessel in the port of San Juan, Puerto Rico. The sole claim is for unseaworthiness, the injury having been caused by an admittedly defective shackle, recently bought. The defense was that the vessel was under demise charter to Bordas. [fol. 64] The court ruled that the evidence showed no such charter.[1] This ruling was wrong. A demise charter may be, as this one was claimed to be, by parole. *James* v. *Brophy*, 1 Cir., 1895, 71 Fed. 310, 312. We do not gather the court thought otherwise. We believe the court was misled by testimony of Bordas' representative that the arrangement was not the usual charter party (although he added that "it is a kind of a charter").[2] The witness, a layman, was not qualified to draw legal conclusions. Moreover, his reservations appear to have been that it was neither a time charter, nor a bare boat charter, rather than that there was no charter at all. A demise, of course, is not a time charter, and it need not be of a bare boat. *United States* v. *Shea*, 1894, 152 U.S. 178.

The evidence showed that respondent, permanently residing within the Dominican Republic, had had no connection with the operation of the Caribe for some five years, except that he had appointed, or "employed," the master. That action would not mean a control of the vessel so as to prevent a demise. See *United States* v. *Shea, supra; Grilleg* v. *United States*, 2 Cir., 1956, 229 F.2d 687, 689-90; *The Willie*, 2 Cir., 1916, 231 Fed. 865. Bordas' representa-

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[1] We are satisfied on the record that with characteristic forthrightness the court did not seek to avoid the necessity of ruling by making a finding that it did not believe testimony which in fact it did believe. Under these circumstances, and since, in addition, this evidence was inherently credible and undisputed, we will accept it without the necessity of remand. See *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 1 Cir., 1960, 284 F.2d 582, 587, *cert. den.*, 365 U.S. 833; *Texas Co.* v. *R. O'Brien & Co.*, 1 Cir., 1957, 242 F.2d 526, 529.

[2] Actually, the court inaccurately quoted the witness as having said, "something like a charter, but not a charter."

tive testified, without contradiction, that the master was under Bordas' orders. Bordas paid the master, the crew, and all expenses of the vessel, and paid respondent a flat monthly sum. The suggestion that it was merely an agent for respondent is without merit. Libellant offers no ex-[fol. 65] planation why an agent should be making fixed monthly payments to a principal, rather than the reverse. We hold the evidence indisputably shows that Bordas was operating the ship as a demisee. *Reed* v. *United States*, 1870, 78 U.S. (11 Wall.) 591, 601 ("possession, command, and navigation").

In *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F.2d 286, we held that an owner who has surrendered all control by demise was not liable in personam for unseaworthiness. Possibly we erred in extending this rule indiscriminately to cases where the unseaworthy condition preceded the demise. See *Cannella* v. *Lykes Bros. S.S. Co.*, 2 Cir., 1949, 174 F.2d 794, 795, *cert. den.*, 338 U.S. 859. But we see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession. See *Grillea* v. *United States*, *supra*, at 689, 690. The judgment in personam against respondent must be set aside.

Respondent, as claimant to the vessel, also asks us to dismiss the libel in rem. Since Bordas' obligations under the Puerto Rico Workmen's Compensation Act represent its exclusive liability to its employees, 11 L.P.R.A. ch. 1, §21, an obligation obviously not here involved, and since the owner of the vessel is not personally liable at all, respondent contends that the vessel should not be independently charged. We agree.

It is generally accepted that the in rem action in admiralty and the maritime lien are correlative. "Where one exists, the other can be taken, and not otherwise." *The Rock Island Bridge*, 1867, 73 U.S. (6 Wall.) 213, 215; see *The Resolute*, 1897, 168 U.S. 437, 440; *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 581; 1 Benedict, Admiralty 18 (6 ed. Knauth 1940); Gilmore & Black, Admiralty 510 (1957); Price, Maritime Liens 12 (1940); Robinson, Admiralty 362 (1939). This does not solve our problem, because we could hold that a lien had arisen from a claim against the ship

[fol. 66] notwithstanding the absence of a claim against any distinct juridical person, but it does focus attention on the necessity of an underlying claim. The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the "personification" of the vessel is not a convenient shorthand method of expressing legal results. See Price, Maritime Liens 16 (1940); Hebert, "The Origin and Nature of Maritime Liens," 1930, 4 Tul. L. Rev. 381, 392. It is something else to use the characterization to achieve them.

In a variety of situations courts have refused to charge the ship when neither the owner nor the party in possession, nor the agents of either, were personally liable. In *Queen of the Pacific*, 1901, 180 U.S. 49, it was argued that a stipulation in a bill of lading requiring all claims against a shipowner to be brought within a certain time did not prevent an in rem action against the vessel after that time. The court rejected this, saying, "The *'claim'* is in either case against the company, though the *suit* may be against its property." 180 U.S. at 53. (Ital. in orig.) In *The Oceanica*, 2 Cir., 1909, 170 Fed. 893, 898, *cert. den.*, 215 U.S. 599, it was alleged that a tug had negligently caused the loss of her tow. The towage contract exempted the tug owner from negligence.[3] The Court refused to charge the tug. That this was not simply a question of contractual interpretation is made clear by *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F.Supp. 171, 172-73, where the tug was operated by an allegedly exempted demisee. *The Western Maid*, 1922, 257 U.S. 419, involved several collisions in which vessels owned outright or *pro hac vice* by [fol. 67] the United States were assumed to be at fault. Sovereign immunity at that time prevented suits against the government. The court refused to hold that a lien had attached which was enforceable when the ship passed into private hands. More recently, in *Noel* v. *Isbrandtsen Co.*, 4 Cir., 1961, 287 F.2d 783, in rem liability was not estab-

[3] *But see Bisso* v. *Inland Waterways Corp.*, 1955, 349 U.S. 85.

lished because of the failure to show any personal obligation owed to the libellant to furnish a seaworthy ship.

There is nothing in the doctrine of unseaworthiness that should lead to a different result. It is true that one speaks of unseaworthiness "of the vessel" and of "liability without fault," but this cannot obscure the fact that liability depends upon a legal obligation growing out of a relationship between individuals: the injured party and the one charged with preventing the injury.[4] See *United New York and New Jersey Sandy Hook Pilot Association* v. *Halecki*, 1959, 358 U.S. 613, 616; *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 95-96; *id.* at 104 (dissenting opinion); *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 100, 103-04; *The Osceola*, 1903, 189 U.S. 158, 171, 175; *cf. Grillea* v. *United States*, *supra*, at 690. A ship does not make a warranty. Whether one speaks in terms of holding out, *cf. West* v. *United States*, 1959, 361 U.S. 118, 122, or duty owed, *Halecki*, *supra*, unseaworthiness liability requires something more than a mere defective condition of the vessel. See *Noel* v. *Isbrandtsen Co.*, *supra*.

In *Smith* v. *The Mormacdale*, 3 Cir., 1952, 198 F.2d 849, *cert. den.*, 345 U.S. 908, a longshoreman who was limited in his rights against his employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-50, [fol. 68] was held unable to proceed against the vessel which was owned by his employer, although the vessel's unseaworthy condition was alleged. Following the teaching of the cases earlier discussed, we are not prepared to reach a different conclusion simply because title to the vessel is in the hands of another party who is also not personally liable. *Cf. Pedersen* v. *Bulklube*, D.C.E.D.N.Y., 1959, 170 F.Supp. 462, 466-67, *affirmed*, 274 F.2d 824, *cert. den.*, 364 U.S. 814; *Vitozi* v. *Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686; *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F. Supp. 171, 172-73 (dictum). *But see Leotta* v. *The S.S. Esparta*,

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[4] Liability without fault in analogous situations has not led courts to describe the result as other than an adjustment of loss between the parties involved. See, *e.g.*, *Exner* v. *Sherman Power Constr. Co.*, 2 Cir., 1931, 54 F.2d 510, 512-14. See generally, Prosser, Torts 317-18 (2d ed. 1955).

D.C.S.D.N.Y., 1960, 188 F. Supp. 168, 169, *infra; Reed* v. *The Yaka*, D.C. E.D. Pa., 1960, 183 F. Supp. 69, *infra*. Nor, by some process of inverse reasoning, does this lead us to say that a demisor is personally liable for a condition of unseaworthiness created by the demisee. It should be enough that his ship is subject to a lien to secure whatever obligation the demisee has personally incurred in his operation of the ship. See *The Barnstable*, 1901, 181 U.S. 464.

It is true that in *Grillea* v. *United States*, 2 Cir., 1956, 232 F.2d 919 (2-1), the court reached the opposite result. It did so without discussion, and with only the simple statement, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam.'" 232 F.2d at 924. With all deference we think so novel a principle needs more support than a statement that the court sees no reason against it. *Grillea* seems the more surprising in that Judge Hand, the writer of the majority opinion, had observed not long before, after discussing the ancient doctrine of deodand, "Disputes arise between human beings, not inanimate things; . . . a vessel . . . is, and can be, nothing but the measure of [claimant's] stake in the controversy." *Burns Bros.* v. *The Central R.R. of New Jersey*, 2 Cir., 1953, 202 F.2d 910, 913.

[fol. 69] *Grillea* has resulted in some discussion of the effect of an indemnity clause in the demise. *Leotta* v. *The S.S. Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168. See also *Reed* v. *The Yaka*, D.C.E.D. Pa., 1960, 183 F. Supp. 69. We would agree with *Yaka* that the existence of an indemnity clause is beside the point. But we cannot agree with *Yaka* that the fact that the demising owner is eventually going to get the boat back is determinative. This was answered by *The Western Maid*, *supra*. *Cf. Pedersen* v. *Bulklube*, *supra*.

We do not reach respondent's other contentions, one of which appears to have some merit.

Judgment will be entered vacating the judgment of the District Court and remanding the action for entry of a judgment of dismissal.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—May 29, 1961

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered adjudged and decreed as follows: The judgment of the [fol. 70] District Court is vacated and the cause is remanded to that Court for the entry of a judgment of dismissal.

By the Court: Roger A. Stinchfield, Clerk, By: Dana H. Gallup, Chief Deputy Clerk.

Approved: Peter Woodbury, Ch. J.

Thereafter, on June 29, 1961, mandate issued and the original papers were returned to the District Court.

[fol. 71] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 72]

SUPREME COURT OF THE UNITED STATES

No. 358, October Term, 1961

LAUREANO MAYSONET GUZMAN, Petitioner,

vs.

RAMON RUIZ PICHIRILO.

ORDER ALLOWING CERTIORARI—November 6, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October Term, 1961

No. 358

LAUREANO MAYSONET GUZMAN,
PETITIONER.

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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INDEX

Cases Cited

STATUTES

Supreme Court of the United States

October Term, 1961

No.

LAUREANO MAYSONET GUZMAN,

PETITIONER,

v.

RAMON RUIZ PICHIRILO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States.

The petitioner, by his counsel, Max Goldman, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which reversed the decree in favor of petitioner and dismissed petitioner's libel filed in the United States District Court for the District of Puerto Rico, and in support of his petition, does show:

1. The opinion of the United States Court of Appeals for the First Circuit is not reported as of this date, and is

appended hereto at pages 15-21 *infra*. The opinion of the United States District Court for the District of Puerto Rico was not reported and appears in the certified record at pages 56-58.

2. The judgment of the United States Court of Appeals for the First Circuit vacating the judgment of the District Court of Puerto Rico and remanding for entry of a judgment of dismissal is dated May 29, 1961.

Jurisdiction

The jurisdiction of this Honorable Court to review by way of writ of certiorari is based on United States Code, Title 28, Sections 1254(1) and 2101(c) and Supreme Court Rules, Rule 19, Subsection 1(b).

Questions Presented

3. The questions presented for review are:

A 1. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control?

A 2. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control, and if the demise charterer is also the stevedore-employer insured under a system of workmen's compensation?

These questions comprise other issues e.g.: whether a vessel may be liable *in rem* for unseaworthiness if there is

no *in personam* liability on the part of the owner or demise charterer; whether the longshoreman's right to a seaworthy vessel is extinguished by his employer becoming the demise charterer; whether the shipowner's duty to furnish a seaworthy vessel may be contracted away by the device of a demise charter; and, whether the stevedore-employer can avoid the obligation of indemnifying the shipowner for an unseaworthy condition that he, the employer, creates by acquiring the vessel under a demise charter.

B. Does the Court of Appeals have the power to reverse findings of fact, based in whole or in part upon the credibility of witnesses, in an admiralty matter on its own independent reading of the record?

Necessarily contained in this question are the subsidiary questions of whether an appeal in admiralty is a trial *de novo* and whether a Court of Appeals has the right to reverse the District Court's findings if not clearly erroneous.

4. The constitutional provisions involved are:
United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citi-

zens thereof, and foreign States, Citizens or Subjects."

The statute involved is:

Laws of Puerto Rico Annotated, Title 11, Section 21:

"When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement of the Case

The petitioner, a longshoreman, was injured on board the M/V Caribe, of Dominican registry, when the shackle on the boom broke causing it to fall and strike him on the head. He sustained severe and permanent injuries. Suit was commenced in the United States District Court for the District of Puerto Rico, in Admiralty, by a libel filed on December 5, 1958.

Jurisdiction was based on the admiralty and maritime jurisdiction of the United States and both *in rem* and *in personam* remedies were sought against the vessel and the owner. The vessel was seized, pursuant to lawful process on December 10, 1958. The vessel and owner appeared on December 23, 1958 by filing a claim in the form of a motion.

In the answer, the respondents averred that the vessel had been "chartered" to Bordas & Co., of San Juan, Puerto

Rico, the stevedore employer of the petitioner. The affirmative defenses alleged, inter alia, the receipt of compensation by petitioner, and the charter and surrender of control of the area wherein the accident occurred.

Introduced into evidence at the trial was a deposition of the master, a Dominican, who characterized himself as an employee of the respondent and referred to the stevedore as a third-party, incorrectly translating its name into Spanish. Aside from a physician, the only witness who appeared for the respondents was the principal officer of the stevedore employer. He testified:

> "Q. Will you please state your connection with Ruiz Pichirilo in this case? A. He has been a business relation of ours for many years. We have been managing and operating the "Carib" for around five years. He lives in the Dominican Republic." (R. 51).

At the close of all the testimony, respondent's proctor requested time to file a memorandum based on the defense that Ramon Ruiz Pichirilo was not liable because he had no control of the vessel. Thereupon the following colloquy took place:

> "The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.
>
> "Mr. Rodriguez: No, the owner, not the operator. The operator is Bordas and Company.

"The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 55).

No contracts, charter parties nor any other document corroborating Bordas' interest in the vessel was offered. In its opinion the District Court stated that it could find no lawful basis for holding that the vessel was under a demise charter (R. 57) and in its findings found that the owner was in possession and control of the M/V CARIB. (R. 58).

The United States Court of Appeals did not question the fact that the vessel was unseaworthy. The reversal was predicated upon this Court's interpretation that the evidence showed a demise charter by parole and could admit no other interpretation. A demise charterer being *pro hac vice* the owner, the Court of Appeals reasoned, the true owner could not be liable *in personam*. Despite the fact that the demisee created the unseaworthy condition, it could not be liable *in personam* because as stevedore-employer it was insulated by the exclusive remedy provisions of the Workmen's Accident Compensation Act of Puerto Rico.

The Court of Appeals then held that a vessel could not be liable *in rem*, if there were no *in personam* liability, even if the vessel were unseaworthy and it ordered the dismissal of the libel.

In its opinion, the Court of Appeals for the First Circuit frankly admitted that its holding was directly in conflict with decisions of other United States Courts of Appeals and other United States District Courts.

Argument

A. The Court of Appeals for the First Circuit Has Decided a Federal Question Directly in Conflict with Decisions of Other Courts of Appeals and Other Federal District Courts.

The decision of which review is sought is irreconcilable with three decisions of the United States Court of Appeals for the Second Circuit.

Grillea v. *United States*, 1956, 232 F2 919,
Burns Bros. v. *The Central R.R. of New Jersey*, 1953, 202 F.2d 910.
Cannella v. *Lykes Bros. S.S. Co.*, 1949, 174 F2 794, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

Despite the reliance upon the decision as authority, it is submitted that the opinion of the court below is irreconcilable with the decision of the United States Court of Appeals for the Fourth Circuit in *Noel* v. *Isbrandtsen Co.*, 1961, 287 F2 783.

Chronologically, the first case involving some of the precise issues involved in the case at bar was *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F2d 286, wherein it was held that an owner who had surrendered control by a demise was not liable *in personam* for unseaworthiness.

Libellant, in that case, a longshoreman, later filed an *in rem* action against the vessel in the Southern District of New York. That case was dismissed upon the ground that the demisee was the stevedore-employer whose liability under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 905, was exclusive and the vessel,

being his under the demise, was not a third person within the meaning of the statute.

Vitozi v. *S.S. Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686.

At least insofar as unseaworthy conditions which arose prior to the demise, the Second Circuit held just the opposite from the First Circuit's decision in *Vitozi* and this Court seemingly concurred by refusing to grant certiorari.

Cannella v. *Lykes Bros. S.S. Co.*, 1949, 174 F2d 794, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

In *Burns Bros.* v. *The Central R.R. of New Jersey*, 1953, 202 F2d 910, the Second Circuit held that even though no *in personam* liability attached to an owner out of possession for collision damage caused by negligent navigation, the vessel was nevertheless liable for the damages *in rem*. Moreover, Judge Hand, after tracing the historical development of *in rem* actions, concluded that a prior favorable decree *in personam* would not bar a subsequent action *in rem*, if the *in rem* remedy were unavailable at the time the *in personam* suit was brought.

All of the issues presented in the instant case were presented in *Grillea* v. *United States*, 2 Cir., 1956, 232 F2d 919 and Judge Learned Hand decided each of them exactly contrary to decision now rendered by the Court of Appeals for the First Circuit. In *Grillea*, the respondents asserted that no maritime lien could be imposed where no jural person is liable *in personam*, citing, just as did the court below, *The Western Maid*, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299. Judge Hand held that the decision in that case was altogether foreign to the case of private wrongs.

Thus we have a situation existing wherein on the identical operative facts a longshoreman can recover for injuries caused by unseaworthiness in the Second Circuit and in the First Circuit he can not.

Since the decision in *Grillea*, the precise questions involved herein have arisen in two other District Court cases both of which have followed the decision of the Second Circuit.

In *Reed* v. *The Yaka*, D.C.E.D., 1960, 183 F. Supp. 69, all of the cases cited by the Court of Appeals in the instant case were rejected by the Judge who imposed liability *in rem*. The fact that ultimate responsibility for payment of the judgment may fall upon the employer whose liability is exclusive was held to have been answered conclusively by this Court in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Furthermore, it was pointed out that if argument of the respondent were adopted, the holding of *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, would be vitiated.

183 F. Supp. at page 76.

The Court of Appeals for the First Circuit, however, adopted that argument and has thus vitiated *Sieracki*.

In *Leotta* v. *The SS Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168, the precise issues involved in the case at bar arose again. Faced with the obvious conflict between *Vitozi* v. *S.S. Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686 and *Reed* v. *The Yaka*, D.C.E.D. Pa. 1960, 183 F. Supp. 169, the trial judge ruled that the *Reed* decision was correct, basing his conclusion on *Grillea* and *Ryan*.

The decision in the instant case recognizes the irreconcilability of its position with *Grillea*, *Reed* and *Leotta*, but insists that they are wrong.

As authority for its position, the First Circuit relies upon the decision of *Noel* v. *Isbrandtsen Company*, 1961, 4 Cir., 287 F2d 783. It is submitted that *Noel*, too, is directly in conflict with the opinion below. In *Noel*, the libellant was not entitled to a seaworthy vessel; the vessel, having been permanently withdrawn from navigation, did not warrant its seaworthiness; and, there was a finding that there was no negligence. The *in rem* action was dismissed, the Court saying:

> "We know of no precedent for requiring her to respond as an absolute insurer for personal injury where there has been no violation of any warranty of unseaworthiness and it is not established that anyone connected with her has been at fault."
>
> 287 F2d at page 787.

May it seriously be contended that the quoted language is authority for holding that no *in rem* liability may be imposed when the unseaworthiness is conceded, and in fact, was never contested?

Until the decision in the case at bar, it was obvious that *Grillea* was the law. Now, the law is confusion and the conflict, it is respectfully submitted, can be resolved only by this Court.

B. The Court of Appeals for the First Circuit Has Decided a Question of Admiralty and Maritime Law in Conflict with the Authoritative Decisions of This Court.

a) In a long line of decisions this Court has held that *in rem* liability may be imposed, even when the owner may not be liable *in personam*.

For piracy, in the absence of privity or knowledge on the part of the owner, ships were held subject to forfeiture.

The Palmyra, 25 U.S. (12 Wheat) 1, 6 L. Ed. 531.
The Malek Adhel, 43 U.S. (2 How.) 210, 11 L. Ed. 239.

A vessel is liable *in rem* for collision damage caused by the negligence of a compulsory pilot.

The China, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67.

Sixty years ago admiralty lawyers recognized that a vessel, demised under a charter, was liable *in rem*, for collision damage. The only issue that came before this Court was whether the owner or demisee bore ultimate responsibility under the charter party.

The Barnstable, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954.

More recently, this Court awarded recovery to a libellant, also a longshoreman, against the vessel although it had been chartered under a demise, where the demisee was not the stevedore-employer.

Crumady v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

Exceptions to the imposition of liability *in rem* exist when the injured party has exonerated the vessel's owner in advance or when the lien is sought because of a wrongful act of the sovereign for which it has not consented to be sued.

Queen Of The Pacific, 180 U.S. 49, 21 S. Ct. 278, 45 L. Ed. 419.
The Western Maid, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299.

The First Circuit has applied the exceptions where they are inapplicable because the instant case involved no exoneration and no sovereign.

b) Until the decision of the court below it was axiomatic that a shipowner could not contract away or delegate his duty to furnish or maintain a seaworthy vessel to all those entitled to such a warranty.

Mahnich v. *Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561.

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143.

Alaska S.S. Co., Inc. v. *Petterson*, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798.

Rogers v. *United States Lines*, 347 U.S. 984, 74 S. Ct. 849, 98 L. Ed. 1120.

Crumady v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

United New York and New Jersey Sandy Hook Pilots Ass'n. v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541.

Mitchell v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

The fact that the stevedore-employer, against whom suit may not be brought, may ultimately have to indemnify the shipowner does not in any way affect the injured worker's right against the shipowner or the vessel.

Ryan Stevedoring Co., Inc. v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Crumady v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2, 413.

What the respondent has done is to set up a bare boat charter to contract for the sole responsibility for unseaworthiness and then set up the Workmens Accident Compensation Act of Puerto Rico as a bar to recovery What is invited by the decision below are contracts for situations such as exist here, for the sole purpose of destroying a longshoreman's *in rem* remedy. No more was the Puerto Rican Statute, 11 L.P.R.A. 21, enacted to diminish the longshoreman's rights than was the federal statute, 33 U.S.C. 905.

Reed v. *The Yaka*, D.C.E.D. Pa., 1960, 183 F. Supp. 69, 75-77.

If the decision of the United States Court of Appeals for the First Circuit is not reversed, the principles laid down in all of the cases subsequent to *Sieracki* would become empty words.

c) The Court of Appeals for the First Circuit has violated the standards set by this Court in reviewing findings of the District Court, sitting without a jury in admiralty. The findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

At the trial there was conflicting evidence. No documents, contracts, charter-parties or correspondence was offered by the respondents to corroborate the existence of a demise. The trial judge stated on the record that he did not believe that the stevedore-employer was operating the vessel (R. 55) and he formally so found. (R. 58)

Conceding *arguendo* that a demise charter may be established by parole, although aside from harbor craft there is no modern example of such practice in the shipping industry, this Court has stated:

> "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer."
>
> *Reed* v. *United States*, 78 U.S. (1 Wall), 391, 20 L. Ed. 220.

The action of the United States Court of Appeals for the First Circuit was not a review at all. It was a trial *de novo*, without benefit of demeanor evidence.

It is urged that the findings of the District Court are not only not clearly erroneous but that they are manifestly correct.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit in this cause and this Court should review and reverse the decision of the Court of Appeals.

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Of Counsel.

Appendix

United States Court of Appeals
For the First Circuit

No. 3650.

RAMON RUIZ PICHIRILO,

RESPONDENT, APPELLANT,

v.

LAUREANO MAYSONET GUZMAN,

LIBELLANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before WOODBURY, *Chief Judge*, and MARIS* and ALDRICH, *Circuit Judges*.

Seymour P. Edgerton, with whom *Ionias Rodriguez Moreno*, *Hiller B. Zobel*, *W. C. Moffett* and *Bingham, Dana & Gould* were on brief, for appellant.

Harvey B. Nachman, with whom *Stanley L. Feldstein* and *Golenbock, Nachman & Feldstein* were on brief, for appellee.

OPINION OF THE COURT.
May 29, 1961.

ALDRICH, *Circuit Judge*. This is a libel in rem against the M/V Caribe and in personam against her owner (hereinafter respondent) for personal injury sustained by libellant, a longshoreman employed by Bordas & Co., a stevedoring concern engaged in discharging the vessel in the port of San Juan, Puerto Rico. The sole claim is for unseaworthiness, the injury having been caused by an admittedly defective shackle, recently bought. The defense was that the vessel was under demise charter to Bordas.

* Sitting by designation.

The court ruled that the evidence showed no such charter.[1] This ruling was wrong. A demise charter may be, as this one was claimed to be, by parole. *James* v. *Brophy*, 1 Cir., 1895, 71 Fed. 310, 312. We do not gather the court thought otherwise. We believe the court was misled by testimony of Bordas' representative that the arrangement was not the usual charter party (although he added that "it is a kind of a charter").[2] The witness, a layman, was not qualified to draw legal conclusions. Moreover, his reservations appear to have been that it was neither a time charter, nor a bare boat charter, rather than that there was no charter at all. A demise, of course, is not a time charter, and it need not be of a bare boat. *United States* v. *Shea*, 1894, 152 U.S. 178.

The evidence showed that respondent, permanently residing within the Dominican Republic, had had no connection with the operation of the Caribe for some five years, except that he had appointed, or "employed," the master. That action would not mean a control of the vessel so as to prevent a demise. See *United States* v. *Shea*, *supra*; *Grillea* v. *United States*, 2 Cir., 1956, 229 F.2d 687, 689-90; *The Willie*, 2 Cir., 1916, 231 Fed. 865. Bordas' representative testified, without contradiction, that the master was under Bordas' orders. Bordas paid the master, the crew, and all expenses of the vessel, and paid respondent a flat monthly sum. The suggestion that it was merely an agent for respondent is without merit. Libellant offers no ex-

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[1] We are satisfied on the record that with characteristic forthrightness the court did not seek to avoid the necessity of ruling by making a finding that it did not believe testimony which in fact it did believe. Under these circumstances, and since, in addition, this evidence was inherently credible and undisputed, we will accept it without the necessity of remand. See *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 1 Cir., 1960, 284 F.2d 582, 587, *cert. den.*, 365 U.S. 833; *Texas Co.* v. *R. O'Brien & Co.*, 1 Cir., 1957, 242 F.2d 526, 529.

[2] Actually, the court inaccurately quoted the witness as having said, "something like a charter, but not a charter."

planation why an agent should be making fixed monthly payments to a principal, rather than the reverse. We hold the evidence indisputably shows that Bordas was operating the ship as a demisee. *Reed* v. *United States*, 1870, 78 U.S. (11 Wall.) 591, 601 ("possession, command, and navigation").

In *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F.2d 286, we held that an owner who has surrendered all control by demise was not liable in personam for unseaworthiness. Possibly we erred in extending this rule indiscriminately to cases where the unseaworthy condition preceded the demise. See *Cannella* v. *Lykes Bros. S.S. Co.*, 2 Cir., 1949, 174 F.2d 794, 795, *cert. den.*, 338 U.S. 859. But we see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession. See *Grillea* v. *United States*, *supra*, at 689, 690. The judgment in personam against respondent must be set aside.

Respondent, as claimant to the vessel, also asks us to dismiss the libel in rem. Since Bordas' obligations under the Puerto Rico Workmen's Compensation Act represent its exclusive liability to its employees, 11 L.P.R.A. ch. 1, §21, an obligation obviously not here involved, and since the owner of the vessel is not personally liable at all, respondent contends that the vessel should not be independently charged. We agree.

It is generally accepted that the in rem action in admiralty and the maritime lien are correlative. "Where one exists, the other can be taken, and not otherwise." *The Rock Island Bridge*, 1867, 73 U.S. (6 Wall.) 213, 215; see *The Resolute*, 1897, 168 U.S. 437, 440; *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 581; 1 Benedict, Admiralty 18 (6 ed. Knauth 1940); Gilmore & Black, Admiralty 510 (1957); Price, Maritime Liens 12 (1940); Robinson, Admiralty 362 (1939). This does not solve our problem, because we could hold that a lien had arisen from a claim against the ship

notwithstanding the absence of a claim against any distinct juridical person, but it does focus attention on the necessity of an underlying claim. The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the "personification" of the vessel is not a convenient shorthand method of expressing legal results. See Price, Maritime Liens 16 (1940); Hebert, "The Origin and Nature of Maritime Liens," 1930, 4 Tul. L. Rev. 381, 392. It is something else to use the characterization to achieve them.

In a variety of situations courts have refused to charge the ship when neither the owner nor the party in possession, nor the agents of either, were personally liable. In *Queen of the Pacific*, 1901, 180 U.S. 49, it was argued that a stipulation in a bill of lading requiring all claims against a shipowner to be brought within a certain time did not prevent an in rem action against the vessel after that time. The court rejected this, saying, "The '*claim*' is in either case against the company, though the *suit* may be against its property." 180 U.S. at 53. (Ital. in orig.) In *The Oceanica*, 2 Cir., 1909, 170 Fed. 893, 898, *cert. den.*, 215 U.S. 599, it was alleged that a tug had negligently caused the loss of her tow. The towage contract exempted the tug owner from negligence.[3] The Court refused to charge the tug. That this was not simply a question of contractual interpretation is made clear by *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F.Supp. 171, 172-73, where the tug was operated by an allegedly exempted demisee. *The Western Maid*, 1922, 257 U.S. 419, involved several collisions in which vessels owned outright or *pro hac vice* by

[3] *But see Bisso* v. *Inland Waterways Corp.*, 1955, 349 U.S. 85.

the United States were assumed to be at fault. Sovereign immunity at that time prevented suits against the government. The court refused to hold that a lien had attached which was enforceable when the ship passed into private hands. More recently, in *Noel* v. *Isbrandtsen Co.*, 4 Cir., 1961, 287 F.2d 783, in rem liability was not established because of the failure to show any personal obligation owed to the libellant to furnish a seaworthy ship.

There is nothing in the doctrine of unseaworthiness that should lead to a different result. It is true that one speaks of unseaworthiness "of the vessel" and of "liability without fault," but this cannot obscure the fact that liability depends upon a legal obligation growing out of a relationship between individuals: the injured party and the one charged with preventing the injury.[4] See *United New York and New Jersey Sandy Hook Pilot Association* v. *Halecki*, 1959, 358 U.S. 613, 616; *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 95-96; *id.* at 104 (dissenting opinion); *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 100, 103-04; *The Osceola*, 1903, 189 U.S. 158, 171, 175; *cf. Grillea* v. *United States*, *supra*, at 690. A ship does not make a warranty. Whether one speaks in terms of holding out, *cf. West* v. *United States*, 1959, 361 U.S. 118, 122, or duty owed, *Halecki*, *supra*, unseaworthiness liability requires something more than a mere defective condition of the vessel. See *Noel* v. *Isbrandtsen Co.*, *supra*.

In *Smith* v. *The Mormacdale*, 3 Cir., 1952, 198 F.2d 849, *cert. den.*, 345 U.S. 908, a longshoreman who was limited in his rights against his employer by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-50,

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[4] Liability without fault in analogous situations has not led courts to describe the result as other than an adjustment of loss between the parties involved. See, *e.g.*, *Exner* v. *Sherman Power Constr. Co.*, 2 Cir., 1931, 54 F.2d 510, 512-14. See generally, Prosser, Torts 317-18 (2d ed. 1955).

was held unable to proceed against the vessel which was owned by his employer, although the vessel's unseaworthy condition was alleged. Following the teaching of the cases earlier discussed, we are not prepared to reach a different conclusion simply because title to the vessel is in the hands of another party who is also not personally liable. *Cf. Pedersen* v. *Bulklube*, D.C.E.D.N.Y., 1959, 170 F.Supp. 462 466-67, *affirmed*, 274 F.2d 824, *cert. den.*, 364 U.S. 814; *Vitozi* v. *Platano*, D.C.S.D.N.Y., 1948, 1950 A.M.C. 1686; *The Elizabeth M. Miller*, D.C.W.D.N.Y., 1932, 3 F. Supp. 171, 172-73 (dictum). *But see Leotta* v. *The S.S. Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168, 169, *infra; Reed* v. *The Yaka*, D.C. E.D. Pa., 1960, 183 F. Supp. 69, *infra*. Nor, by some process of inverse reasoning, does this lead us to say that a demisor is personally liable for a condition of unseaworthiness created by the demisee. It should be enough that his ship is subject to a lien to secure whatever obligation the demisee has personally incurred in his operation of the ship. See *The Barnstable*, 1901, 181 U.S. 464.

It is true that in *Grillea* v. *United States*, 2 Cir., 1956, 232 F.2d 919 (2-1), the court reached the opposite result. It did so without discussion, and with only the simple statement, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam.'" 232 F.2d at 924. With all deference we think so novel a principle needs more support than a statement that the court sees no reason against it. *Grillea* seems the more surprising in that Judge Hand, the writer of the majority opinion, had observed not long before, after discussing the ancient doctrine of deodand, "Disputes arise between human beings, not inanimate things; . . . a vessel . . . is, and can be, nothing but the measure of [claimant's] stake in the controversy." *Burns Bros. v. The Central R.R. of New Jersey*, 2 Cir., 1953, 202 F.2d 910, 913.

Grillea has resulted in some discussion of the effect of an indemnity clause in the demise. *Leotta* v. *The S.S. Esparta*, D.C.S.D.N.Y., 1960, 188 F. Supp. 168. See also *Reed* v. *The Yaka*, D.C.E.D. Pa., 1960, 183 F. Supp. 69. We would agree with *Yaka* that the existence of an indemnity clause is beside the point. But we cannot agree with *Yaka* that the fact that the demising owner is eventually going to get the boat back is determinative. This was answered by *The Western Maid*, *supra*. *Cf. Pedersen* v. *Bulklube*, *supra*.

We do not reach respondent's other contentions, one of which appears to have some merit.

Judgment will be entered vacating the judgment of the District Court and remanding the action for entry of a judgment of dismissal.

Supreme Court of the United States

October Term, 1961

No. 358

LAUREANO MAYSONET GUZMAN,
PETITIONER,

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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INDEX

CASES CITED

STATUTES

Supreme Court of the United States

October Term, 1961

No.

LAUREANO MAYSONET GUZMAN,
PETITIONER,

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States.

The petitioner, by his counsel, Max Goldman, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which reversed the decree in favor of petitioner and dismissed petitioner's libel filed in the United States District Court for the District of Puerto Rico, and in support of his petition, does show:

1. The opinion of the United States Court of Appeals for the First Circuit is not reported as of this date, and is

appended hereto at pages 15-21 *infra*. The opinion of the United States District Court for the District of Puerto Rico was not reported and appears in the certified record at pages 56-58.

2. The judgment of the United States Court of Appeals for the First Circuit vacating the judgment of the District Court of Puerto Rico and remanding for entry of a judgment of dismissal is dated May 29, 1961.

Jurisdiction

The jurisdiction of this Honorable Court to review by way of writ of certiorari is based on United States Code, Title 28, Sections 1254(1) and 2101(c) and Supreme Court Rules, Rule 19, Subsection 1(b).

Questions Presented

3. The questions presented for review are:

A 1. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control?

A 2. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control, and if the demise charterer is also the stevedore-employer insured under a system of workmen's compensation?

These questions comprise other issues e.g.: whether a vessel may be liable *in rem* for unseaworthiness if there is

no *in personam* liability on the part of the owner or demise charterer; whether the longshoreman's right to a seaworthy vessel is extinguished by his employer becoming the demise charterer; whether the shipowner's duty to furnish a seaworthy vessel may be contracted away by the device of a demise charter; and, whether the stevedore-employer can avoid the obligation of indemnifying the shipowner for an unseaworthy condition that he, the employer, creates by acquiring the vessel under a demise charter.

B. Does the Court of Appeals have the power to reverse findings of fact, based in whole or in part upon the credibility of witnesses, in an admiralty matter on its own independent reading of the record?

Necessarily contained in this question are the subsidiary questions of whether an appeal in admiralty is a trial *de novo* and whether a Court of Appeals has the right to reverse the District Court's findings if not clearly erroneous.

4. The constitutional provisions involved are:
United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citi-

zens thereof, and foreign States, Citizens or Subjects."

The statute involved is:

Laws of Puerto Rico Annotated, Title 11, Section 21:

"When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement of the Case

The petitioner, a longshoreman, was injured on board the M/V Caribe, of Dominican registry, when the shackle on the boom broke causing it to fall and strike him on the head. He sustained severe and permanent injuries. Suit was commenced in the United States District Court for the District of Puerto Rico, in Admiralty, by a libel filed on December 5, 1958.

Jurisdiction was based on the admiralty and maritime jurisdiction of the United States and both *in rem* and *in personam* remedies were sought against the vessel and the owner. The vessel was seized, pursuant to lawful process on December 10, 1958. The vessel and owner appeared on December 23, 1958 by filing a claim in the form of a motion.

In the answer, the respondents averred that the vessel had been "chartered" to Bordas & Co., of San Juan, Puerto

Rico, the stevedore employer of the petitioner. The affirmative defenses alleged, inter alia, the receipt of compensation by petitioner, and the charter and surrender of control of the area wherein the accident occurred.

Introduced into evidence at the trial was a deposition of the master, a Dominican, who characterized himself as an employee of the respondent and referred to the stevedore as a third-party, incorrectly translating its name into Spanish. Aside from a physician, the only witness who appeared for the respondents was the principal officer of the stevedore employer. He testified:

> "Q. Will you please state your connection with Ruiz Pichirilo in this case? A. He has been a business relation of ours for many years. We have been managing and operating the "Carib" for around five years. He lives in the Dominican Republic." (R. 51).

At the close of all the testimony, respondent's proctor requested time to file a memorandum based on the defense that Ramon Ruiz Pichirilo was not liable because he had no control of the vessel. Thereupon the following colloquy took place:

> "The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.
>
> "Mr. Rodriguez: No, the owner, not the operator. The operator is Bordas and Company.

"The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 55).

No contracts, charter parties nor any other document corroborating Bordas' interest in the vessel was offered. In its opinion the District Court stated that it could find no lawful basis for holding that the vessel was under a demise charter (R. 57) and in its findings found that the owner was in possession and control of the M/V CARIB. (R. 58).

The United States Court of Appeals did not question the fact that the vessel was unseaworthy. The reversal was predicated upon this Court's interpretation that the evidence showed a demise charter by parole and could admit no other interpretation. A demise charterer being *pro hac vice* the owner, the Court of Appeals reasoned, the true owner could not be liable *in personam*. Despite the fact that the demisee created the unseaworthy condition, it could not be liable *in personam* because as stevedore-employer it was insulated by the exclusive remedy provisions of the Workmen's Accident Compensation Act of Puerto Rico.

The Court of Appeals then held that a vessel could not be liable *in rem*, if there were no *in personam* liability, even if the vessel were unseaworthy and it ordered the dismissal of the libel.

In its opinion, the Court of Appeals for the First Circuit frankly admitted that its holding was directly in conflict with decisions of other United States Courts of Appeals and other United States District Courts.

Argument

A. The Court of Appeals for the First Circuit Has Decided a Federal Question Directly in Conflict with Decisions of Other Courts of Appeals and Other Federal District Courts.

The decision of which review is sought is irreconcilable with three decisions of the United States Court of Appeals for the Second Circuit.

Grillea v. *United States*, 1956, 232 F2 919,

Burns Bros. v. *The Central R.R. of New Jersey*, 1953, 202 F.2d 910.

Cannella v. *Lykes Bros. S.S. Co.*, 1949, 174 F2 794, certiorari denied, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

Despite the reliance upon the decision as authority, it is submitted that the opinion of the court below is irreconcilable with the decision of the United States Court of Appeals for the Fourth Circuit in *Noel* v. *Isbrandtsen Co.*, 1961, 287 F2 783.

Chronologically, the first case involving some of the precise issues involved in the case at bar was *Vitozi* v. *Balboa Shipping Co.*, 1 Cir., 1947, 163 F2d 286, wherein it was held that an owner who had surrendered control by a demise was not liable *in personam* for unseaworthiness.

Libellant, in that case, a longshoreman, later filed an *in rem* action against the vessel in the Southern District of New York. That case was dismissed upon the ground that the demisee was the stevedore-employer whose liability under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 905, was exclusive and the vessel,

Table of Contents.

Table of Authorities Cited.

Cases.

STATUTE.

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 358.

LAUREANO MAYSONET GUZMAN,
Petitioner,

v.

RAMON LUIS PICHIRILO,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinion of the Court of Appeals.

The opinion of the Court of Appeals, which is printed as an appendix to the petition (Pet. 15-21), has now been reported at 290 F. 2d 812, and at 1961 A.M.C. 1588.

Questions Presented.

Respondent agrees that Question A 1 as stated by petitioner should be answered in the affirmative, but urges that it does not state the issue presented by his petition.

Respondent submits that petitioner's Question A 2 presents the basic issue for the consideration of this Court, *provided* it is understood that the system of longshoremen's compensation insurance involved makes compensation the longshoreman's exclusive remedy against his employer. 11 L.P.R. A. c. 1, sec. 21.

Petitioner also asks "whether the longshoreman's right to a seaworthy vessel is extinguished by his employer becoming a demise charterer." Respondent would rephrase this question thus: "May the longshoreman's recovery from his employer for injury caused by unseaworthiness be limited by a validly applicable Workmen's Compensation Act?"

Statement of Case.

Respondent adds to petitioner's statement only that the shackle which broke was a "new" shackle (R. 40). There is no suggestion that it had been installed prior to the commencement of the charter, five years earlier. Petitioner does not attack the Court of Appeals' statement that the unseaworthy shackle had been furnished by the charterer "recently" (290 F. 2d 812, 813).

We emphasize that petitioner's coming under the care of the State Insurance Fund of Puerto Rico, and his final award of compensation thereunder, were not only alleged as an affirmative defense (Pet. 5, R. 10), but were alleged in the libel (R. 4) and admitted in petitioner's own testimony (R. 14).

Argument.

A. The Opinion Below does Not Conflict with Opinions of Other Circuits.

The First Circuit's opinion below fully accords with those of other circuits, as an examination of the relevant cases will demonstrate.

(1) *Burns Brothers* v. *The Central R.R. of New Jersey*, 202 F. 2d 910 (2d Cir. 1953), expressed an accepted principle of maritime law: A vessel is liable in rem for a col-

lision caused by the negligent act of the demise charterer even though the general owner out of possession is not liable *in personam;* but, as the opinion shows (202 F. 2d at 911), the demisee remained so liable. The instant case is quite different. Here the demisee (whose fault would otherwise cast the ship *in rem*) had been statutorily exempted from any *in personam* liability to petitioner beyond that created by the Puerto Rican Compensation Act.

(2) *Cannella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794 (2d Cir.), *cert. denied* 338 U.S. 859 (1949), is equally in accord with the opinion below. In *Cannella* the longshoreman had been employed by an independent stevedore under contract to the demise charterer's operating agent. The injury resulted from an unseaworthy condition created *before* the charter period began, and the shipowner was therefore held liable.* However, in the instant case the unseaworthiness arose *during* the charter period; in *Cannella* the Second Circuit agreed that such unseaworthiness could not be attributed to an owner out of possession and control.

(3) Despite what petitioner says in his brief, *Noel* v. *Isbrandtsen Co.*, 287 F. 2d 783 (4th Cir. 1961), does not conflict with the opinion below. The decision in *Noel* clearly states that, if no one is liable *in personam*, the vessel may not be made liable *in rem* to the libelant, whether by reference to the fiction of personification or otherwise.

(4) Petitioner relies most heavily on *Grillea* v. *United States*, 232 F. 2d 919 (2d Cir. 1956), as evidence of con-

*To be sure, the First Circuit, in *Vitesi* v. *Bulbos Shipping Co.*, 163 F. 2d 286 (1st Cir. 1947), held that the owner who had demised the vessel was not liable for unseaworthiness whenever occurring; but in its opinion in the instant case, 230 F. 2d 812, 813-814, the First Circuit recognized that under the *Cannella* decision there should perhaps be a limitation placed upon the *Vitesi* holding.

flict between the circuits. We urge that this view of *Grillea* ignores both the facts of that case and subsequent interpretations which the Second Circuit itself has put on it. In *Grillea* the Court emphasized the reliance of its opinion on the charterer's written agreement to indemnify the general owner against liens arising out of the operation of the vessel. There is no specific indemnity agreement in the instant case.

In any event, whatever force *Grillea* might have had when it was written has since evaporated. It is no longer regarded as law even in the Second Circuit. Petitioner errs when he argues (Pet. 10) that until the present decision "it was obvious that *Grillea* was the law." In *Bennett* v. *The Mormacteal and Moore-McCormack Lines, Inc.*, 160 F. Supp. 840 (E.D. N.Y. 1957), *aff'd per curiam* 254 F. 2d 138 (2d Cir. 1958), the Court, denying liability of a vessel *in rem* to a longshoreman where the owner-stevedore in possession and control was protected from further liability by the Longshoremen's and Harbor Workers' Compensation Act, noted the "great stress" which Judge Hand had placed on "the written contract of indemnity in fixing the liability on the owner of the vessel for any liens incurred during its charter." The decision of the District Court was affirmed *per curiam* by the Court of Appeals on the opinion below.*

Most recently, in *Pedersen* v. *The Bulklube*, 170 F. Supp. 462 (E.D. N.Y. 1959), *aff'd per curiam* 274 F. 2d 824 (2d Cir.), *cert. denied* 364 U.S. 814 (1960), a District Court again explored the *ratio decidendi* of the *Grillea* decision, and noted once more Judge Hand's emphasis of the indemnity agreement in *Grillea*.

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*See also *Smith* v. *S.S. Mormacdale*, 196 F. 2d 849 (3d Cir.), *cert. denied* 345 U.S. 966 (1953); *Samuels* v. *Munson S.S. Line*, 63 F. 2d 861 (5th Cir. 1933).

"Neither Judge Hand nor Judge Abruzzo [in *Bennett* v. *Mormacteal, supra*] explained the significance of a contract of indemnity between a 'guilty' charterer and an 'innocent' shipowner in establishing liability *in rem* in the vessel where the charterer and the owner are not otherwise personally liable. . . . Although at a loss to understand the theoretical significance of [the indemnity agreement], I conclude, in the light of the decision in *Bennett*, that *Grillea* does not sustain the position which libellant advances. In any event, it would be strange logic to hold that a vessel, owned by one who might be otherwise liable in tort but who is within the protection of the Compensation Act, cannot be reached in a proceeding *in rem*, and at the same time to hold, as libellant urges here, that a vessel owned by a wholly innocent third party can be held liable where, as here, there is no contract of indemnity, and the negligence causing the injury is solely attributable to the employer protected by the Compensation Act." 170 F. Supp. at 466-467.

This opinion, too, was affirmed *per curiam* by the Court of Appeals, "on the opinion of" the trial Court. The affirmations of *Bennett* v. *The Mormacteal* and *Pedersen* v. *The Bulklube* clearly indicate that, if *Grillea* were to arise today, the Second Circuit would not follow that opinion's incorrect reasoning.

B. The Decision Below Does Not Conflict with Applicable Decisions of This Court.

We agree that under suitable circumstances *in rem* liability may be imposed upon a vessel even though the owner is not liable *in personam*. It will serve no purpose

now to discuss the various contexts in which that situation results. Absent the owner's *in personam* liability, *in rem* liability normally results when the owner has entrusted the control of the vessel to another voluntarily, as in the case of a demise charter, or has entrusted the navigation to another even involuntarily, as in the case of a compulsory pilot.* But, as already discussed, *Pedersen* v. *The Bulklube, supra*, pp. 4-5, *in rem* liability may not flow from the act or failure of a demise charterer who has, as here, a personal statutory defense.

The decision of the Court of Appeals in the instant case does not conflict with any of the cases cited by petitioner at page 11 of the petition. The only one of those cases which factually approaches the instant case in the slightest degree is *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423 (1959); but there the charter was a time charter and the owner retained possession and control of the vessel.† There was thus no issue as to the relative responsibilities of a general owner and an owner *pro hac vice*.

Petitioner has admitted the existence of exceptions to the imposition of liability *in rem* (Pet. 11), but says that the First Circuit "has applied the exceptions where they

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*Forfeiture of the vessel for piracy is not the imposition of liability for a tort, but is the imposition of a sanction against criminal violation of law.

†Petitioner incorrectly asserts (Pet. 11) that the vessel had been chartered under a demise. The transcript of the record of that case in this Court (Nos. 61 and 62, October Term, 1958) shows that libelant alleged that the owners operated the ship through their agents, servants or employees (Art. 11 of the libel; R. 9). The answer admitted ownership, and in article 11 of the answer admitted that respondent operated the vessel (with the usual additional allegation excepting those parts of the vessel which had been turned over to the stevedore and the longshoremen) (R. 12). The cross-petition for writ of certiorari in No. 62 states that the stevedoring contract was made by the time charterer (pp. 3, 5).

are inapplicable, because the instant case involved no exoneration . . ." (Pet. 12). But there was, indeed, exoneration here: the Workmen's Accident Compensation Act of Puerto Rico, 11 L.P.R.A. c. 1, sec. 21, provides that, when the employer has insured his workmen under the Act, compensation is the exclusive remedy against the employer. *Queen of the Pacific*, 180 U.S. 49 (1901), and *The Western Maid*, 257 U.S. 419 (1922), therefore directly support the decision below.

Petitioner also cites eight decisions of this Court holding that a shipowner cannot contract away or delegate his duty to furnish or maintain a seaworthy vessel (Pet. 12). None of the cited cases treats the relative responsibilities of a general owner and an owner *pro hac vice*. None of them holds that the general owner of a demised vessel continues to bear the obligation of ensuring seaworthiness of the vessel after the demise period has begun. Indeed, none of those cases except *Crumady* deals with a charter at all; and in *Crumady* the charter arrangement was a time charter, not a demise (as pointed out, *supra*, p. 6 and footnote).

The decision below in no way departs from the principles laid down in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946). It holds merely that the general owner is not responsible for unseaworthiness arising after the demise, and that, where the demisee has a personal statutory exemption from liability, the vessel may not be seized and condemned *in rem* to satisfy a claim based on such unseaworthiness.

To subject M/V Cabo to seizure and condemnation *in rem* in this case would be to apply the property either to a liability for which the general owner bears no responsibility or to a liability from which the demise charterer, by valid enactment, has been exempted. See *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 23-24 (1960);

Consumers Import Co. v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 254 (1943); *The City of Norwich*, 18 U.S. 468, 503 (1886).

C. The Court of Appeals did Not Deviate from This Court's Accepted Principles in Holding that the Cabib was Demised to the Stevedore-Employer.

The Court of Appeals here reversed the District Judge on a ruling of law. The District Court had said (R. 57): "The evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter party to Bordas & Company." In other words, the District Court ruled that the evidence did not suffice to support a finding of a demise. The ruling was thus equivalent to a directed verdict in a jury case. We urge that, because the District Court was wrong as a matter of law, the Court of Appeals was free to correct the error. Contrary to petitioner's contention (Pet. 13), there was no conflicting evidence. All testimony to the method of operation of the Cabib came from one witness, Bordas (R. 49-55). His evidence being inherently credible and undisputed, the finding of the existence of a demise charter must follow as a matter of course upon reversal of the trial Court's erroneous ruling as to the sufficiency of the evidence. (See opinion below, 290 F. 2d, at 813, n. 1.)

There is no conflict here with *McAllister* v. *United States*, 348 U.S. 19 (1954). The Court of Appeals, after reversing the District Court's error, properly made the correct finding. In the face of such uncontradicted and unquestioned evidence, a remand to the District Court with instructions to make the same finding would be a useless, time-wasting formality.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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In the
Supreme Court of the United States

October Term 1961

No. 358

LAUREANO MAYSONET GUZMAN,
PETITIONER,

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

Miscellaneous

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court, D.P.R., Hale-Navarro, D.J., (R. 17-19), does not appear in the Official Reporter. The opinion of the Court of Appeals (R. 23-27), is reported at 289 F. 2d 612.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered May 29, 1961 (R. 28). Petition for a Writ of Certiorari was filed on August 25, 1961 and was granted, November 6, 1961 (R. 29).

The jurisdiction of this Honorable Court to review the final judgment of the United States Court of Appeals for the First Circuit is provided by Sections 1254 (1) and 2101 (e) of Title 28, U. S. Code.

Constitutional and Statutory Provisions

The constitutional provisions involved are:

United States Constitution, Article 3, Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statute involved is:

Laws of Puerto Rico Annotated, Title 11, Section 2:

"When an employer insures his workmen or employees in accordance with this chapter, the right

herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement of the Case

The petitioner, a longshoreman, was injured on board the M/V CARIB, of Dominican registry, when the shackle on the boom broke causing it to fall and strike him on the head. He sustained severe and permanent injuries. Suit was commenced in the United States District Court for the District of Puerto Rico, in Admiralty, by a libel filed on December 5, 1958.

Jurisdiction was based on the admiralty and maritime jurisdiction of the United States and both *in rem* and *in personam* remedies were sought against the vessel and the owner. The vessel was seized, pursuant to lawful process on December 10, 1958. The vessel and owner appeared on December 23, 1958 by filing a claim in the form of a motion.

In the answer, the respondents averred that the vessel had been "chartered" to Bordas & Co., of San Juan, Puerto Rico, the stevedore employer of the petitioner. The affirmative defenses alleged, inter alia, the receipt of compensation by petitioner, and the charter and surrender of control of the area wherein the accident occurred.

Introduced into evidence at the trial was a deposition of the master, a Dominican, who characterized himself as an employee of the respondent and referred to the stevedore as a third-party, incorrectly translating its name into Spanish. Aside from a physician, the only witness who

appeared for the respondents was the principal officer of the stevedore employer. He testified:

> "Q. Will you please state your connection with Ruiz Pichirilo in this case? A. He has been a business relation of ours for many years. We have been managing and operating the "Carib" for around five years. He lives in the Dominican Republic." (R. 13).

At the close of all the testimony, respondent's proctor requested time to file a memorandum based on the defense that Ramon Ruiz Pichirilo was not liable because he had no control of the vessel. Thereupon the following colloquy took place:

> "The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.
>
> "Mr. Rodriquez: No, the owner, not the operator. The operator is Bordas and Company.
>
> "The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 17).

No contracts, charter parties nor any other document corroborating Bordas' interest in the vessel was offered. In its opinion the District Court stated that it could find no lawful basis for holding that the vessel was under a demise charter (R. 19) and in its findings found that the

owner was in possession and control of the M/V CARIB. (R. 20).

The United States Court of Appeals did not question the fact that the vessel was unseaworthy. The reversal was predicated upon this Court's interpretation that the evidence showed a demise charter by parole and could admit no other interpretation. A demise charterer being *pro haec vice* the owner, the Court of Appeals reasoned, the true owner could not be liable *in personam*. Despite the fact that the demisee created the unseaworthy condition, it could not be liable *in personam* because as stevedore-employer it was insulated by the exclusive remedy provisions of the Workmen's Accident Compensation Act of Puerto Rico.

The Court of Appeals then held that a vessel could not be liable *in rem*, if there were no *in personam* liability, even if the vessel were unseaworthy and it ordered the dismissal of the libel.

This appeal is based upon the irreconcilability of the holding by the Court of Appeals with the decision of the United States Court of Appeals for the Second Circuit and with decisions of several District Courts. Petitioner maintains that the opinion appealed from violates the teachings of authoritative decisions of this Court.

Questions Presented

1. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control, and if the demise charterer is also the stevedore-employer insured under a system of workmen's compensation?

2. Does the Court of Appeals have the power to reverse findings of fact, based in whole or in part upon the credibility of witnesses, in an admiralty matter on its own independent reading of the record?

Argument

I. An Injury to Person or Property Resulting from the Unseaworthiness of a Vessel Gives Rise to Liability *In Rem*, Independent of Any *In Personam* Liability.

The petitioner, a longshoreman, was performing services on behalf of the ship when he was struck by the falling boom. The warranty of seaworthiness extended to him.[1] The shackle, although new, broke and the vessel was thus unseaworthy.[2] It would not have mattered if the shackle had been brought aboard by the stevedore,[3] or that no notice of the condition was conveyed to the shipowner.[4]

The owner and his vessel were liable to respond for the unseaworthiness[5] because the obligation is one the owner cannot delegate,[6] even if the vessel is under charter.[7]

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[1] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; *The State of Maryland*, C.C.A. 4th, 1936, 85 F. 2d 944.

[2] *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 64 S. Ct. 445, 88 L. Ed. 561; *Seas Shipping Co.* v. *Sieracki*, *supra*. It is to be noted that the manner in which the injury occurred is nearly identical to the facts in *Sieracki*.

[3] *Alaska S.S. Co., Inc.* v. *Petterson*, 1954, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798; *Rogers* v. *United States Lines*, 1954, 347 U.S. 984, 74 S. Ct. 849, 98 L. Ed. 1120.

[4] *Mitchell* v. *Trawler Racer, Inc.* 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

[5] *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

[6] *Seas Shipping Co.* v. *Sieracki*, *supra*.

[7] *Grillea* v. *United States*, 2 Cir. 1954, 232 F. 2d 919, *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

The absolute liability of the owner has been softened by allowing him to recover indemnity from the third party responsible for creating or bringing the unseaworthy condition into play,[8] regardless of the existence of a direct contractual relation between the shipowner and the creator of the unseaworthy condition or *of the existence* of a contract of indemnity.[9]

In spite of this body of law, the Court of Appeals for the First Circuit denied the petitioner his right to recover, although conceding that the injury resulted from unseaworthiness.[10] It held that the maritime lien was defeated because the owner-demisor had no personal liability and neither did the charterer because he was insulated by exclusive workmen's compensation[11] and without *in personam* liability there was no liability *in rem*.

The personification of a vessel may have feudal origins,[12] but the doctrine is useful and logical[13] and recognized by this Court.[14] A vessel does not contract for services, navigate, load and discharge, pay wages or injure persons or property by itself. Human hands will and must control (or fail to control) its every operation. But if the ship does not answer for the contractual liabilities rendered on its behalf or for the damages caused by negligence or unseaworthiness, the victim may have an action without a remedy.

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[8] *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 1956, 350 U.S. 85, 76 S. Ct. 232, 100 L. Ed. 133; *Crumady* v. *The Joachim Hendrich Fisser*, *supra*.

[9] *Waterman Steamship Corporation* v. *Dugan & McNamara, Inc.*, 1960, 364 U.S. 421, 81 S. Ct. 200, 5 L. Ed. 2d 169.

[10] *Ruiz Pichirilo* v. *Maysonet Guzman*, 1 Cir. 1961, 290 F. 2d 812, at 813.

[11] 11 L.P.R.A. 21

[12] *Burns Bros.* v. *The Central R.R. of New Jersey*, 2 Cir. 1953, 202 F. 2d 910.

[13] *Holmes, The Common Law* (1881) 26-27.

[14] *Canadian Aviator Ltd.* v. *United States*, 1945, 324 U.S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

For this reason, this Court has imposed liability upon the vessel itself, even in circumstances wherein the owner had no personal responsibility. Ships have been forfeited for statutory violations[15] and piracy[16] without privity or knowledge on the part of the owner. Damages caused by the negligence of a compulsory pilot devolve upon the vessel.[17]

Likewise, a vessel must respond *in rem* for damage caused during a demise charter. When this question first came before this Court, it had been taken for granted that *in rem* liability existed and the only issue litigated was whether the owner or demisee bore the ultimate responsibility under the charter party.[18]

In a recent decision, treating of a scow which capsized during a demise, the Court said:

> "It is hornbook law that a maritime lien arises in favor of a party injured by the negligence of anyone lawfully in control of a vessel. This result follows despite the fact that the owner has absolutely no control over the vessel. See Robinson on Admiralty, pp. 363-368; The Law of Admiralty by Gilmore and Black, Ch. IX (3), p. 494; The Barnstable, 1901, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954; Burns Bros. v. Central R.R. of New Jersey, 2 Cir., 1953, 202 F. 2d 910; The Stamford, D.C.S.D.N.Y. 1929, 35 F. 2d 55. The main opinion held that there was an unrebutted presumption of negligence upon the

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[15] *The Little Charles*, C.C.D. Va. 1818, 26 Fed. Cases 979, Case No. 15,612.

[16] *The Palmyra*, 1827, 25 U.S. (12 Wheat.), 1, 6 L. Ed. 531; *United States v. The Malek Adhel*, 1844, 43 U.S. (2 How.), 210, 11 L. Ed. 239.

[17] *The China*, 1868, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67.

[18] *The Barnstable*, 1901, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954.

part of the charterer in whose possession the vessel lawfully was. Under those circumstances, a maritime lien arises in favor of those injured through that negligence, namely, the claimants. . . . . ., or, stated in another way, the vessel is liable *in rem* to those claimants."

Rice v. New York Trap Rock Corporation, D.C.S. D.N.Y. 1959, 198 F. Supp. 346 at p. 351.[19]

The vessel is liable for injuries to seamen *in rem*,[20] and this Court has recently upheld decrees in favor of longshoremen injured on demised vessels.[21]

The sole basis for destroying the petitioners maritime lien is the fact that the charterer was also the stevedore-employer whose exclusive liability to its employees was circumscribed by statute. The authority marshalled by the court below to sustain the proposition that there is no *in rem* liability without a correlative *in personam* liability, is, with one exception, inapposite.

In both the *Queen of the Pacific*, 1901, 180 U.S. 49, 21 S. Ct. 278, 45 L. Ed. 419, and *The Oceanica*, C.C.A. 2d 1909, 170 F. 893, cert. den. 215 U.S. 599, 30 S. Ct. 400, 54 L. Ed. 343, the shipowner had been relieved of responsibility by contract, and it was held that his property was likewise relieved from seizure. A contract such as was involved in *The Oceanica*, may, today, be unenforceable,[22]

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[19] affirmed, sub. nom. *In Re Rice's Petition*, 2 Cir. 1961, 294 F. 2d 272.

[20] "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appertinent to the ship." *The Osceola*, 1903, 189 U.S. 158, 175.

[21] *Connelly v. The Josephine Knickerbocker Plover*, supra, *Waterman Steamship Corporation v. Dugan & Hoffmann, Inc.* supra.

[22] *Sieracki v. Seas Shipping Corporation*, 1946, 328 U.S. 85, 75 S. Ct. 620, 99 L. Ed. 911.

but even were it valid, we do not comprehend the applicability of such a holding to the case at bar. The longshoreman didn't and couldn't contract away his right to a seaworthy vessel, and according to the cases the obligation of the shipowner to provide a seaworthy vessel is absolute.

It is true that *The Western Maid*, 1922, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299, held that no *in rem* liability could be imposed even though the claim was for collision damage. During the first World War the United States was the absolute owner or demise charterer of several vessels that caused damage. After the end of hostilities the vessels were either sold or returned to their original owners. Until that moment no suit could have been brought because the government had not consented to be sued.[33] When the vessels reached private hands, suits were instituted and this Court issued prohibitions against their sale by judicial decree. Although the language of the decision has been criticised,[34] the Courts have regarded the decisions as limited to cases involving the sovereign.[35] Justice Holmes, never intended that it apply to cases such as the one on appeal for he said:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force." *The Western Maid*, 257 U.S. 419 at 433.

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[33] This situation has been altered by the enactment of the Public Vessels Act, 46 U.S.C. 781, et seq.

[34] Hough, *Admiralty Jurisdiction of Late Years*, 37 Harv. L. Rev. 1924; Gilmore and Black, *The Law of Admiralty*, pp. 500-507.

[35] Grillea v. *United States*, 2 Cir. 1926, 232 F. 2d 919, 923.

It is suggested that not only have the facts been stretched but also that logic has been twisted to enable *The Western Maid* to have any application to this case. The personality of the vessels in *The Western Maid* had merged in the sovereign, who was immune from suit and incapable of passing imperfect title. However, a maritime lien arose against the M/V CARIB and our demise charterer is no sovereign.

Two other authorities cited by the Court of Appeals are, it is submitted, equally inapplicable. *Noel* v. *Isbrandtsen Company*, 4 Cir. 1961, 287 F. 2d 783 and *Pedersen* v. *The Bulklube*, D.C.E.D.N.Y. 1959, 170 F. Supp. 462, affirmed per curiam 274 F. 2d 824, cert. denied 364 U.S. 814, 81 S. Ct. 44, 5 L. Ed. 2d 46 are cases which revolve about the questions of status of the vessel, status of the injured party, and whether the warranty of seaworthiness is applicable. In determining whether there is such a warranty one must first look to the status of the vessel.[26] It was determined in both cases that the ship was not in navigation and that the warranty of seaworthiness was not applicable.[27]

Furthermore, whether the injured party was entitled to the warranty of a seaworthy vessel was questioned in each case, for Noel was a surveyor and Pedersen, a shipyard rigger.[28] In *Noel*, the court found no negligence and being no warranty of seaworthiness, the libel was dismissed. This is not a negation of the principles enunciated by Judge Learned Hand in *Grillea v. United States*.[29] Judge Sobeloff, writing for the Court of Appeals for the Fourth Circuit, said:

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[26] *West* v. *United States*, 1959, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161.

[27] *Roper* v. *United States*, 1961, U.S. , 82 S. Ct. 5, L. Ed. 2d.

[28] *United New York and New Jersey Sandy Hook Pilots Ass'n.* v. *Halecki*, 1961, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541.

[29] 232 F. 2d 919.

"It is one thing to hold that a conviction or liability *in personam* is not a condition precedent to the action *in rem;* it would be quite another to say that the vessel may be held accountable as an entity when there has been no violation of the warranty of seaworthiness or a breach of duty on the part of anyone."

287 F. 2d 783 at page 786.[30]

Similarly, Pederson was engaged on a ship withdrawn from navigation and not entitled to a seaworthy vessel. The negligence which occasioned the injury was the negligence of his employer. The shipowner could only have been liable for the negligence of the employer if he had exercised control and possession.[31]

No one has denied that the vessel in the instant case was unseaworthy; nor has anyone denied that the petitioner was within the class to be protected by this humanitarian doctrine. The maritime lien arose immediately upon the breach of duty, whereas in the cited cases there was no duty.

In opposition to the petition for certiorari, the respondent cited several cases of this Court in support of the proposition that one cannot apply the property of one who bears no responsibility.[32] These cases answered ques-

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[30] In *Latus v. United States*, 2 Cir. 1960, 277 F. 2d 264, Judge Learned Hand said: "We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or some specified class of persons like a compulsory pilot. . . . Grillea v. United States, 2 Cir., 232 F. 2d 919 merely held that a longshoreman might sue a ship *in rem* if he was injured by her unseaworthiness, which no one denies."

[31] *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

[32] Brief for respondent in opposition to petition for certiorari, pp. 7-8.

tions that were either procedural[33] or involving interpretations of particular statutes that limited liability.[34] They did not intend to destroy the historic difference and distinction between admiralty actions *in personam* and those *in rem*.[35] Nor do we suppose that they intended to destroy the absolute non-delegable duty of the shipowner to provide those persons who did the traditional work of a seaman with a seaworthy vessel.

The only case which may be said to be a precedent for the holding of the court below is *Vitozi* v. *S.S. Platano*, D.C.S.D.N.Y. 1948, 1950 A.M.C. 686.[36] Originally, the longshoreman in that case had sued the shipowner *in personam* but had been told that only the demise charterer was liable for unseaworthiness.[37]

In the *in rem* action, Vitozi was again advised that he had no claim, because the demise charterer's liability was exclusively the compensation owed under the statute[38] and the vessel being his under the demise was not a third party within the meaning of the statute.

In *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, the majority held, "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner."[39] This limited exception was preceded by this admonition:

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[33] *Continental Grain Company* v. *The FBL—585*, 1960, 364 U.S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540.

[34] *The City of Norwich*, 1886, 118 U.S. 468, 6 S. Ct. 1150, 30 L. Ed. 134; *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 1963, 320 U.S. 249, 64 S. Ct. 15, 88 L. Ed. 20.

[35] Dissenting opinion in *Continental Grain Company* v. *The FBL-585*, supra, 364 U.S. 19, at pp. 37-38.

[36] Not officially reported.

[37] *Vitozi* v. *Suffren Shipping Co.*, C.C.A. 1st, 1967, 163 F. 2d 986.

[38] 33 U.S.C.A. 905

[39] 328 U.S. 85 at p. 102

"It is a form of absolute duty owing to all within the range of its humanitarian policy.

"On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection."[40]

The limited exception alluded to in Sieracki had some authority[41] and has continued to be applied in those cases where the actual owner is also the stevedore-employer.[42] We assume that the result should be the same under the workmen's compensation status involved herein,[43] which unquestionably applies to petitioner.[44]

Until the decision in the court below, *Vitozi* was the only case that held that the demisee was such an owner than *in rem* liability could not be imposed. But it was not the only case in which the question arose. The principles of both *Vitozi* cases were contradicted by the United States Court of Appeals for the Second Circuit with this language:

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[40] 328 U.S. 85 at p. 95

[41] *Samuels* v. *Munson S.S. Line*, C.C.A. 5th, 1933, 63 F. 2d 861.

[42] *Smith* v. *S.S. Mormacdale*, 3 Cir. 1953, 198 F. 2d 849, cert. denied 345 U.S. 908, 73 S. Ct. 648, 97 L. Ed. 1344; *Bennett* v. *The Mormacteal*, *D.C.E.D.N.Y.* 1957, 160 F. Supp. 840, affirmed 254 F. 2d 138, cert. denied, 358 U.S. 817, 79 S. Ct. 26, 3 L. Ed. 2d 59.

[43] 11 L.P.R.A. 1 et seq.

[44] *Guerrido* v. *Alcoa Steamship Co.*, 1 Cir. 1956, 234 F. 2d 349.

"If the demisee becomes liable for breach of warranty of unseaworthiness, a maritime lien arises upon the ship securing the obligee. Regardless of whether such lien arises when the demisee becomes liable for other default, we cannot doubt that one does arise when, as here, the liability is imposed in lieu of a warranty of seaworthiness, and upon the theory that, even where there is such a warranty, the resulting liability sounds in tort. Since the lien extends to unseaworthiness supervening after delivery, as well as that already existing, the owner demisor, so far as his ship will answer, is initially subject to a larger liability than is subject to under the putative imposed liability, although in cases of supervening unseaworthiness the eventual loss would no doubt fall on the demisee."

Cannella v. *Lyke Bros. S.S. Co.*, 2 Cir. 1949, 174 F. 2d 794, at p. 796, cert. denied 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

Today the Court of Appeals for the First Circuit, in the light of the *Cannella* opinion, admits it may have erred in *Vitozi* v. *Balboa Shipping Co.*, C.C.A. 1st, 1947, 163 F. 2d 286, but only as to cases where the unseaworthy condition preceded the demise.[48] Why there should be a distinction between unseaworthiness arising before or after the demise is unexplained. In either case the lien arises while the demisee is in possession and in either case the owner has the same interest in the vessel.

Burns Bros. v. *Central R.R. of New Jersey*, 2 Cir. 1953, 202 F. 2d 910, although not identical, involved parallel issues. In that case, libellant's barge was negligently in-

[48] 290 F. 2d 812 at page 814.

jured by a carfloat owned by Central Railroad of New Jersey which was being operated by the Long Island Railroad. At the time, Central Railroad was undergoing reorganization, so that process *in rem*, might not have been obtainable. After a decree *in personam* was rendered against Long Island, it went into reorganization. The libellant was then in the same position as the petitioner is here. Central had no *in personam* liability and Long Island had its liability limited. A subsequent suit *in rem* was permitted because a lien had arisen, by the violation of duty by one in control.

In *Grillea* v. *United States*, 2 Cir. 1956, 232 F. 2d 919, a longshoreman employed by the demisee was permitted to recover because of the unseaworthiness of the vessel. The principle enunciated in *Grillea* was labeled "novel" in the court below. The novelty of *in rem* liability for unseaworthiness causing personal injuries is at least as old as *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760. We suggest that Grillea is not "novel", but that the doctrine of absolute liability for unseaworthiness is still unpalatable in some quarters.[46]

Faced with the choice between *Vitozi* v. *S.S. Platano*, *supra*, and *Grillea* v. *United States*, a District Court in the Third Circuit chose the latter, holding that a mere bareboat charter to the stevedore-employer could not destroy the injured longshoreman's maritime lien. The court answered the respondent's contention that the lien was being imposed against the property of the employer who was exonerated from all other liability through the exclusivity of compensation, by saying:

> "We simply point out that whatever bundle of rights in the ship the real owner surrenders under

[46] *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir. 1959, 265 F. 2d 426, reversed 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

a bareboat charter, he does retain the right to the return of his ship at some future time. . . . . .

"Moreover, the question of operation and control of the ship would appear to have no real significance in an in rem action for unseaworthiness, since unseaworthiness is not based upon negligence or any wrongful act. Rather it is a form of absolute liability which is imposed regardless of fault. Seas Shipping Co. v. Sieracki, supra. Therefore we are not particularly persuaded by the nature of a bareboat charter. This fact might be more evident if we imagine a case with the exact same facts as the present one, the only difference being that the bareboat charter contained no indemnity clause. In such a suit the charterer would not (as it did here) move to strike the real owner of the vessel as respondent and itself defend the action. Yet the real owner undoubtedly could not set up the Longshoremen's and Harbor Workers' Act as a bar to recovery. The only difference between such a case and our own is the indemnity clause, which the Supreme Court has said is not determinative. See, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra"[47]

Reed v. *The Yaka*, D.C.E.D. Penna., 1960, 183 F. Supp. 69 at page 76.

The precise question before the Court was presented in New York as well in the case of *Leotta* v. *The S.S. Esparta*, D.C.S.D. N.Y., 1960, 188 F. Supp. 168. Again *Vitozi* was rejected. It was reasoned that despite the fact that a demisee is owner *pro haec vice*, it is *only pro haec vice*. There is, and can be, no complete identity between

[47] It is to be noted that the defense herein was conducted by the charterer who did set up compensation as a bar.

the ship and demise-employer as in the case where the employer is the actual shipowner.

Several of the Justices of this Court were reluctant to concur in the *Ryan Stevedoring* case[48] for fear that the placing of ultimate responsibility on the stevedore on the basis of breach of warranty of workmanlike performance would vitiate the underlying basis for the unseaworthiness doctrine as expressed in *Sieracki*.[49]

When the protective scope of the unseaworthiness doctrine was broadened to include longshoremen, this Court observed:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within the scope of its policy."

Seas Shipping Co. v. *Sieracki*, supra, 328 U.S. 85 at page 100.

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[48] *Ryan Stevedoring Co.*, v. *Pan Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

[49] "These (hazards of marine service) together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. These risks are available by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, supra, 328 U.S. 85, 93-94.

Having been under the impression that compensation statutes were enacted to enlarge workers' rights, not diminish them, we fail to see how the combination of a demise charter and stevedore-employer relationship can purge the owner of his non-delegable duty and extinguish the worker's right and his lien.

The avenue of escape for the shipowner from the obligation of providing a seaworthy vessel heretofore required him to do his own stevedoring.[50] Now, all that is required is a demise charter arrangement. From the cases one can infer that this device is prevalent.[51]

We believe that if the doctrine of *Sieracki* is to remain alive, this Court must correct the ruling of the United States Court of Appeals for the First Circuit and adopt the reasoning of the Court of Appeals for the Second Circuit and the several District Court which imposed *in rem* liability upon the vessel in situations identical with the one presented in this appeal.

II. The Findings of the District Court that There Was No Demise Charter and that the Shipowner Was Liable *In Personam* Were Not Clearly Erroneous.

To be able to disagree with the holdings of *Cannella, Grillea, Reed* and *Leotta*, the court below had to first overcome the fact that the District Court had found the evidence "so meager in this respect that I can find no lawful basis for holding that the vessel was under a demise charter party to Bordas & Co."[52]

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[50] In Puerto Rico, two of the largest shipowners who maintain scheduled service now do their own stevedoring, viz., the Alcoa Steamship Co. and A. H. Bull S.S. Co.

[51] In addition to the cases cited we also refer to *Garcia* v. *The Beauregard*, D.C.D.N.J. 1961, 193 F. Supp. 662, which also rejected the *Vitoni holding* and followed *Grillea*, *Reed* v. *The Yaka* and *Leotta* v. *The S.S. Esparta*.

[52] Opinion and Order, R. 19.

Looking at the record, we find that the master, a citizen and resident of the Dominican Republic, testified that he was employed by Ruiz Pichirilo on the Dominican flag vessel. He referred to the stevedore as a third party. Although both Bordas and his proctor were present, no one cross-examined the master.[23]

The only other testimony relating to the alleged demise came from the stevedore-employer, who was characterized by the appellate tribunal as a layman.[24] In response to leading questions Bordas testified that there was a charter. At that moment the Court stated: "I can not give any credit to a witness answering leading questions because the attorney is the one that is testifying . . . . You have been insisting. This witness never mentioned anything about chartering the vessel, and you insisted on chartering, chartering —and then he had to say chartering." (R. 14).

After this, the witness testified that he paid a monthly fee, and all expenses for the vessel. However, he produced no records. No clause of the supposed charter are known. When did it begin, when did it end? What are the conditions of default? Who is responsible for surveys and repairs? Who pays insurance or how is it apportioned? We know as little about the "charter" as did the District Judge who said immediately upon the close of testimony: "That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 17)

Considering that demeanor evidence was available only to the trial judge, it seems to us that the appellate tribunal usurped the functions of the District Court by labeling the testimony that the District Judge refused to believe as inherently credible.

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[23] R. 10-11.

[24] *Ruiz Pichirilo* v. *Mayaguez Gunman*, 1 Cir. 1961, 290 F. 2d 812 at p. 813.

If, as the Court of Appeals says, the criteria of a demise charter are "possession, command and navigation",[55] we still must inquire, possession, command and navigation on behalf of whom!

This is especially so in cases of demise charters by parole because this Court has instructed:

> "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer." *Reed* v. *United States*, 78 U.S. (11 Wall.) 591 at p. 601.

In doubtful cases courts lean to a holding against a demise charter[56] and the burden of proving an agreement, not in writing, rests heavily upon him who asserts it.[57] Even if under American law[58] a demise may be created by parole,[59] no modern example of such a practice exists in the cases apart from small harbor craft[60] unless there has been shown an intention to reduce the agreement to writing.[61]

In the light of these admonitions and returning to the words of *Reed* v. *United States*, *supra*, what ends have been accomplished by the transfer of the vessel? None.

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[55] *Reed* v. *United States*, 1870, 78 U.S. (11 Wall.) 591, 20 L. Ed. 220.

[56] *Ralli Bros.* v. *Isthmian Steamship Co.*, D.C.D. Md. 1940, 35 F. Supp. 986, 994.

[57] *American-Hawaiian Steamship Co.* v. *Willfuehr*, D.C.D. Md. 1921, 274 Fed. 214, aff'd. 280 Fed. 1023.

[58] *James* v. *Brophy*, C.C.A. 1st, 1895, 71 Fed. 310.

[59] Under English law it is "doubtful if a charter by demise can be constituted except by a document in writing." *Scrutton, Charterparties*, 1, note (a) 16 Ed. 1955.

[60] *The Willie*, C.C.A. 2nd, 1916, 231 Fed. 865.

[61] *United States Navigation Co., Inc.* v. *Black Diamond Lines*, C.C.A. 2d 1942, 124 F. 2d 508, cert. denied 315 U.S. 816, 62 S. Ct. 805, 86 L. Ed. 1214.

except to destroy the right and lien of the petitioner. Parenthetically, we note that in no other case has a demise charter been collaterally established by parole.

What occurred in the Court of Appeals was a trial *de novo*. This court has barred such a procedure.

McAllister v. *United States*, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

Reinstatement of the findings of the trial court would render it unnecessary to determine whether a vessel may be liable *in rem* to a longshoreman injured as a result of her unseaworthiness, if the longshoreman's employer is also the demise charterer. It would also leave for the future the question of whether a demise by parole may be collaterally established.

We feel that the District Court's findings were manifestly correct and supported by the evidence. We are also mindful of our obligation to our client, above all other considerations. Nevertheless, we would be reluctant to have the decision of the Court of Appeals reversed on the narrow ground that there was no clear error on the part of the District Judge.

The irreconciliability of viewpoints as to the correct interpretation of the maritime law can only be resolved by this Court, and should be resolved now, so as to avoid hopeless confusion. There is one particular reason why this Court should adopt the position of the Court of Appeals for the Second Circuit in this matter. That is that there is no more reason to expunge the security provided by the *in rem* remedy when the vessel is under a demise than when it is in the hands of the shipowner. He cannot discover the unseaworthy condition created by the charterer any easier than he can discover the unseaworthy condition brought into play by a stevedoring contractor.

Yet in the same way that he can insure against the risk, or contract for indemnity or be indemnified by operation of law for the conduct of the stevedore contractor, he can be protected in the case of a demise. He is not prejudiced by the imposition of liability.

If humanitarian justice underlies the doctrine of seaworthiness, it requires a reversal of the decision on appeal.

Conclusion

The findings of the trial court and the decree in favor of the petitioner against both respondents based on these findings should be reinstated. Even if this Court should hold that a demise charter of an ocean going vessel may be orally created on evidence as meagre as that presented to the trial court, the decision of the Court of Appeals for the First Circuit should be reversed, and *in rem* liability should be imposed upon the shipowner for the unseaworthy condition which caused petitioner's disability.

Respectfully submitted,

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Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES ETC.

MISCELLANEOUS.

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 358.

LAUREANO MAYSONET GUZMAN,
Petitioner,

v.

RAMON RUIZ PICHIRILO,
Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

Respondent adds to petitioner's statement that the opinion of the Court of Appeals is also reported at 1961 A.M.C. 1588.

Statement of the Case.

Respondent adds to petitioner's Statement of the Case the following:

The shackle which broke was a "new" shackle (R. 10) "recently bought" (R. 23; 290 F. 2d 813).

Bordas & Co., petitioner's employer, had compensation coverage in the State Insurance Fund (R. 3, 9) under the Workmen's Accident Compensation Act of Puerto Rico (11 L.P.R.A. §§ 1-42, 1955) (Petitioner's Brief 14).

When respondent filed claim to the vessel in the form of a motion (R. 4-5) he filed with it a bond in the amount of $20,000 for discharge of the CARIB from arrest (R. 5-6). The motion was consented to and the discharge was ordered by the District Judge (R. 5).

We do not agree with petitioner (Brief 3) that the CARIB's master described Bordas & Co., the demisee, as a third party (R. 10-11).

The Court of Appeals reversed the District Court upon the incorrectness of the following ruling (R. 19):

> "The evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter to Bordas & Co."

Questions Presented.

Respondent does not agree with the second question as stated by the petitioner (Brief 6). We think the question is:

> Does the Court of Appeals have the power to reverse an incorrect ruling of law, viz., that the evidence was insufficient to permit a finding, and then itself, on undisputed, unimpeached testimony, make the proper finding?

Summary of Argument.

The first question presented by petitioner (Brief 5) is whether a vessel in the possession and control of a demise charterer is liable *in rem* for injuries to a longshoreman under the circumstances presented by the record. The District Court found that respondent was "the owner in

possession and control of the vessel M/V Canna" (R. 20). The Court of Appeals held that there was a demise to Bordas & Co. (R. 24; 290 F. 2d at 813). On the question of the existence of a demise, respondent argues that the Court of Appeals did not transgress the ruling of this Court that findings of fact of the Trial Judge may not be set aside unless clearly erroneous. The argument is that the District Court improperly ruled that there was insufficient evidence to support a finding that the vessel was under demise. The Court of Appeals corrected this ruling and properly made the correct finding on uncontradicted credible testimony.

Point II deals with the liability *in personam* of the owner of a vessel who has demised it to another. Respondent argues that after demise the owner *pro hac vice*, and not the general owner, bears the *in personam* liabilities arising out of the ship's operation. The owner of a vessel in the possession and control of a demisee does not bear personal responsibility for unseaworthiness arising after the demise.

Point III treats the question of the vessel's liability *in rem* and the theory of personification. Respondent shows that petitioner's only remedy against the demisee-stevedore (his employer) was his statutory compensation. Respondent also argues that, when the owner is not liable *in personam* and the demisee's liability has been statutorily limited and (as so limited) satisfied, a separate additional recovery should not be exacted by way of the ship. A ship is not a person; it is but a special kind of property, as this Court has held in various contexts.

Respondent adverts in Point IV to its contention in the Court of Appeals that, should M/V Canna be held liable *in rem*, this liability should be limited to the amount of the bond filed by agreement for discharge of the vessel

from arrest. This contention was not reached in the Court below. It remains to be passed upon if *in rem* liability is sustained.

Argument.

I. The Court of Appeals properly reversed the Trial Court's ruling that the evidence was insufficient to permit a finding of demise, because the only evidence on the point wholly supported that finding, and this evidence was neither incredible nor controverted.

The decision of the Court of Appeals depends upon a holding that the Canm was demised by respondent to Bordas & Co., petitioner's employer. The District Court ruled against the defense based on the demise (R. 19) because it found that the respondent was "the owner in possession and control of the vessel M/V Canm" (R. 20).* Petitioner now treats the action of the District Judge as though it were solely a question of fact-determination based upon the credibility of a witness, and thus within the ruling of this Court in *McAllister v. United States*, 348 U.S. 19, 20 (1954). In *McAllister* this Court equated the power of the Court of Appeals in admiralty to that granted to the reviewing Court by Rule 52(a) of the Federal Rules

*A charter of a vessel occurs when the owner, for valid consideration, makes the usual cargo spaces of the vessel or the entire vessel exclusively available for the use of the charterer. In a voyage or time charter the owner retains possession and control, with the use of the necessary room for the crew and stores, and the charterer has the use of the cargo spaces. A demise results when the hiring is on such terms that the owner gives to the hirer the possession, control and direction of the entire vessel. Robinson, Admiralty, 502-508 (1939). Scrutton, Charterparties, 4-9 (16th ed. 1955). "A demise, of course, is not a time charter, and it need not be of a bare boat" (R. 23; 290 F. 2d at 613). *United States v. Shea*, 152 U.S. 178 (1894).

of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Here, of course, the Trial Court did make a finding that respondent Pichirilo was the owner in possession and control of the vessel. This finding, however, was based upon the statement in the Trial Court's opinion that "the evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter to Bordas & Co." (R. 19). The Trial Court's ruling was thus equivalent to a directed verdict on this point in a jury-tried case.

Apart from the evidence of Jose Lora, master of the CARIB, that he was "employed" (R. 10) by the respondent, all of the evidence concerning the operation of the CARIB came from Luis Manuel Bordas, director-partner of Bordas & Co. (R. 11-17). There was no finding by the Trial Court that the testimony of this witness was not credible. Indeed, the District Judge relied upon his testimony in ruling that he could not hold that the vessel was demised (R. 19). It was this ruling which the Court of Appeals corrected. Pointing out that there was sufficient evidence to support a demise, it reversed the premise on which the finding rested and then made the only finding possible in the light of the evidence in the record. The Court of Appeals did not usurp the Trial Judge's role as assayer of the testimony. There is thus no conflict with *McAllister* v. *United States*, *supra*, or Rule 52(a) of the Rules of Civil Procedure.

Petitioner insists that the District Judge felt that the testimony of Bordas was incredible, an argument based largely upon the colloquy following Bordas's testimony (R. 17):

"Mr. Rodriguez: . . . The operator is Bordas and Company.

"The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat."

This is, of course, a statement, not of unwillingness to believe the testimony of Bordas, but of unwillingness to draw a given conclusion from that testimony.

Bordas testified that his company had been operating the Canm for around five years and that he paid the respondent $200 a month. In addition, he paid all the expenses of the boat. "I mean paying the payrolls, the captain's salary, all the payrolls of the vessel, the food of the crew, the fuel, the maintenance, the repair, the dry docking, the insurance, the port charges, and all the expenses that go with the operation of a vessel" (R. 13). In addition, Bordas said that in the "usual" charter party, plainly referring to a time or voyage charter, "the only thing that the charterer pays is port charges and fuel for the intended voyages" (R. 15). And he continued: "But in this case it is a kind of charter, because it does not comply with the regular provisions of a charter party. I pay the seamen, food, repair, maintenance, drydocking; which in a regular charter party are excluded" (R. 15). Mr. Bordas was clearly distinguishing between a demise, wherein the charterer pays all of the expenses and the charter hire, and a time or voyage charter, wherein the charterer pays only for port charges and fuel (plus, of course, the charter hire).

Petitioner complains (Brief 20) that the testimony does not disclose the details of the charter, as, for example, date of commencement, date of termination and conditions of default. We point out that there was no cross-examination of the witness to develop any of the things about

which petitioner complains. Petitioner also says (Brief 20) that there is no evidence of responsibility for surveys and repairs or for insurance, but the above-quoted testimony of Bordas makes it plain that the charterer paid for those things, as well as all of the expenses that go with the operation of a vessel.

Since the testimony of Bordas was inherently credible, was not found to be incredible by the Trial Judge and indeed was relied upon by him in his opinion (R. 19), though incorrectly quoted (R. 23, 290 F. 2d, at 813) the Court of Appeals properly and fully corrected the judge's error of law.*

Reed v. *United States*, 78 U.S. (11 Wall.) 591, 601 (1870), makes the test of a demise "possession, command, and navigation." The words of the witness Bordas, "controlling, operating and managing the vessel" (R. 16), with a master under his orders (R. 15), meet the test of *Reed* v. *United States*.

Petitioner asks (Brief 21) what ends have been accomplished by the transfer of the vessel, and answers this: "None, except to destroy the right and lien of the petitioner" (Brief 21-22). One purpose, at least, of every demise is to provide for the owner a specified payment for the use of the vessel and to put the risks of profit or loss in the vessel's operation on the demisee. That purpose is here emphasized, because the owner-respondent could not for political reasons leave the Dominican Republic (R. 13).

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*The fact that the master, Jose Lora, was "employed" by the respondent does not prevent a demise. He was under the orders of Bordas & Co. (R. 15), and Bordas & Co. was "controlling, operating and managing the vessel" (R. 16). *United States* v. *Shea*, 152 U.S. 178 (1894). *Grilles* v. *United States*, 229 F. 2d 687, 689-690 (2d Cir. 1956). *The Willie*, 231 Fed. 865 (2d Cir. 1916).

II. THE OWNER OF A VESSEL WHICH IS IN THE POSSESSION AND CONTROL OF A DEMISEE IS NOT LIABLE IN PERSONAM FOR INJURIES CAUSED BY AN UNSEAWORTHY CONDITION CREATED AFTER THE DEMISE AND WHILE THE VESSEL WAS IN THE DEMISEE'S POSSESSION AND CONTROL.

This Court has never had squarely to decide the issue posed by the facts of this case. The Court of Appeals for the First Circuit has held that an owner who surrenders all control of his vessel to a demisee is not liable *in personam* for unseaworthiness, even if such unseaworthiness pre-existed the demise. *Vitozi* v. *Balboa Shipping Co.*, 163 F. 2d 286 (1st Cir. 1947). The First Circuit recognized in its opinion in the instant case (R. 24; 290 F. 2d, at 813-814) that possibly the rule of *Vitozi* should be limited to unseaworthiness which arose after the demise. The doctrine of *Vitozi* as thus modified accords with the position of the Second Circuit, which held in *Cassella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794 (2d Cir. 1949), that the owner would be liable to an injured longshoreman only for that unseaworthiness existing at the time of the demise. In the first *Grillea* decision (*Grillea* v. *United States*, 229 F. 2d 687 (2d Cir. 1956)), the Second Circuit held that the owner of a vessel was not liable to an injured longshoreman for unseaworthiness arising while a demisee was operating the vessel.

We urge that the principle underlying these decisions fully accords with the mandate of this Court in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), that an owner owes a longshoreman a non-delegable duty to provide a seaworthy vessel.

This Court has never held that the owner's non-delegable duty of seaworthiness covers an unseaworthy condition developing after the demise and while the vessel was in the possession of an owner *pro hac vice*. The case of *Cru-*

mady v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), clearly involved a time charter and not a demise. In that case a circuit breaker cut-off whose faulty adjustment caused the accident had been adjusted "by those acting for the vessel owner" (358 U.S. at 427); the crew members, as this Court recognized, were the owner's servants and not those of the charterer. The libel alleged that the owners (incorrectly named) operated the vessel through their agents, servants or employees (article 11 of the libel, printed at page 9 of the *Crumady* Record, Nos. 61 and 62, October Term, 1958). The owner claimed the vessel, and in its answer admitted ownership and, in article 11 admitted that it operated the vessel—excepting those parts turned over to the stevedore and longshoremen (*Crumady* Record 12)—thus negating surrender of possession and control to a demisee. Claimant's cross-petition for writ of certiorari in No. 62 states that the stevedoring contract was made by the time charterer (pp. 3, 5). There was no issue as to the relative responsibilities of the general owner *vis-à-vis* the owner *pro hac vice*.*

It is elementary that a demisee, being the owner *pro hac vice*, bears during the demise the responsibilities of the owner. The general owner is not so liable. *Leary* v. *United States*, 14 Wall. 607, 610 (1871). *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N.Y. 330 (1947).

> "In general, all *in personam* liabilities arising out of the ship's operation are brought home to the demise charterer. It may be of immense economic importance to him that he, as owner, is the warrantor of seaworthiness of the vessel to seamen including long-

*We think the statement of this Court in *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960), that *Crumady* was decided on the premise that the stevedore was engaged "by the party *operating* the ship under a charter" (italics supplied) was an inadvertence.

shoremen, who work aboard her, and that he in consequence may be held liable for personal injuries suffered as a result of breach of the absolute duty to provide a safe place to work and safe implements to work with." Gilmore & Black, The Law of Admiralty, 218 (1957).

See also *The Barnstable*, 181 U.S. 464 (1901).

To visit *in personam* responsibility upon the respondent here would be to undermine and overturn established principles apportioning liability under demise charter arrangements.

III. The Carib was not liable in rem to petitioner, because, as a longshoreman employed by her demisee, he was entitled only to compensation and because the unseaworthiness arose after the demise.

A. Liability of the demisee during whose control, operation and management the unseaworthy condition arose was limited to the payments made under the Workmen's Accident Compensation Act of Puerto Rico.

Bordas & Co. was operating the Carib as demisee at the time of the petitioner's injury (R. 24; 290 F. 2d, at 813). As owner *pro hac vice* it warranted to petitioner that the vessel was seaworthy. Petitioner was a longshoreman-employee of Bordas & Co. (R. 23; 290 F. 2d, at 813; Petitioner's Brief 3). The Workmen's Accident Compensation Act of Puerto Rico (11 L.P.R.A. § 21 (1955), quoted at Petitioner's Brief 2-3), provides:

> "When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer . . ."

The Act unquestionably applies to petitioner (Petitioner's Brief 14; R. 9). The demisee had fully satisfied his statutory obligations to petitioner (R. 3, 9). Thus, the demisee's only obligation to petitioner was under the Compensation Act.

B. When the owner is not liable in personam, *and liability of the demisee has been validly limited and (as limited) satisfied, the vessel is not liable* in rem.

We have no quarrel with the general proposition, so well grounded in the admiralty law, that, even though a vessel is under demise, she may be condemned *in rem* to satisfy obligations of the demisee.

Petitioner, however, would have this Court hold that a vessel may be condemned even where the general owner is not liable *in personam*, the demisee is not liable beyond compensation payments and the vessel was not in control of a compulsory pilot.* The petitioner thus asks this Court to carry the concept of the vessel's personality to an extent far beyond the principles enunciated by any court here or in England.

There have, of course, been many cases which refer to the *in rem* liability of the ship as a personification of the vessel, as though she herself were an independent actor in the situation. As discussed by the Court below, the personification of the vessel is a convenient shorthand method of expressing legal results, but the characterization is not a satisfactory basis for achieving them (R. 25; 290 F. 2d, at 814).

This Court, like others, has used the personification theory. At the same time the Court has recognized the fictive nature of the theory and has freely discarded it when an

*As in *The China*, 74 U.S. (7 Wall.) 53 (1868).

application did not accord with modern ideas of civil responsibility.

In *The Eugene F. Moran*, 212 U.S. 466 (1909), Mr. Justice Holmes, writing for a unanimous Court, said at page 474:

> ". . . No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. . . . Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. . . . But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. . . ."

And in *The Western Maid*, 257 U.S. 419, 433 (1922), he wrote for the majority:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creature of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force."

We believe it significant that the author of these opinions, whose earlier writings are so often cited in support of the personification theory (Holmes, The Common Law,

26-27 (1881)), rejected the fiction of personification when faced with the need to decide actual cases in which its application would be inconsistent and illogical. At any rate, not even in The Common Law did Holmes express the view that the vessel should be subject to condemnation without pre-existing *in personam* liability of someone lawfully and properly responsible for the vessel. He thought that it was the idea of the ship as security for some person's liability which had helped to keep the personification theory alive (The Common Law, 28).

Recently this Court, in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), in dealing with the argument that a single libel against a vessel *in rem* and her owner *in personam* involved two distinct civil actions, commented that that view was based upon "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment" (364 U.S., at 22-23, citing Holmes, The Common Law (1881), 26-27). The Court continued (364 U.S., at 23-24):

> "The fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. . . .
>
> "This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut down, as it would here, the scope of con-

gressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the 'personal' liability of the vessel:

"'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated. . . .' *The City of Norwich,* 118 U.S. 468, 503 [1886].

"Fifty-seven years later, this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

"'The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.' *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 253-254 [1943]."

The Court declined to recognize the fiction of personification to defeat transfer of the action to a more convenient forum under 28 U.S.C. § 1404(a) (1948).

In both *The City of Norwich* and *Consumers Import Co., supra,* this Court dealt with the Limitation of Liabil-

ity of Shipowners statutes (46 U.S.C. §§ 181-191 (1952)). The fact that in those cases it was the Congress which had limited the owner's liability should, we submit, make no difference. If, by general principles of law, the demisor of a seaworthy vessel is not personally liable, and if the demisee's liability has been statutorily limited, and if, further, the demisee has met all his statutory obligations, to persist in saying that the ship may nevertheless be condemned seems to us, as it has to this Court, "like talking in riddles." We submit, moreover, that the solution to the riddle, if any exists, does not emerge from an examination of cases in which "personification" has apparently been applied.

1. The forfeiture cases do not support the application of personification to civil actions.

Forfeitures either for violations of an embargo act (*The Little Charles*, 26 Fed. Cas. 979 (No. 15, 612) (C.C. D. Va. 1818)) or for piracy (*The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States* v. *The Malek Adhel*, 43 U.S. (2 How.) 210 (1844)) depend upon statutory provisions and the power of Congress to impose forfeiture of a vessel without regard to the owner's personal involvement. Chief Justice Marshall (on circuit) in *The Little Charles* and Mr. Justice Story in *The Palmyra* and *The Malek Adhel* both used language of personification which was perhaps appropriate, since the libels were in admiralty and the property was in each instance a vessel, but which was unnecessary at least in the two last-cited cases.* The same sanctions of forfeiture of the participating or of-

*The *Little Charles* dealt with a question of evidence and the Court found it appropriate to use the master's manifest to support a condemnation of the vessel even though it might not have been admissible against the owner *in personam*.

fending vehicle are familiar and of long standing in dealing with smuggling, 19 U.S.C. § 1703 (1958), and similar illegal acts ashore, 49 U.S.C. § 782 (1952). They depend not at all upon admiralty theories of personification of the *res*.

2. The compulsory pilot cases illustrate the outside limit of personification in civil cases.

In the compulsory pilot situation the vessel operator is not liable *in personam* for the faults of a compulsory pilot, because there is no agency (*Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U.S. 406 (1901)); but the vessel is nevertheless liable *in rem*. *The China*, 74 U.S. (7 Wall.) 53 (1868), is the farthest extreme to which "personification" has been pressed in this Court in "taking one man's property to satisfy another man's wrong, . . ."* Even in the compulsory pilotage cases the pilot himself is liable for his own faults.

3. Where bill of lading provisions protect the owner personally, the ship may not be condemned.

This Court has refused to condemn the ship *in rem* where neither the owner nor the party in possession was personally liable. In *Queen of the Pacific*, 180 U.S. 49 (1901), the bill of lading required all claims against the shipowner to be brought within a certain time. The Court held that an action *in rem* after that time could not be maintained, saying:

> "The '*claim*' is in either case against the company, though the *suit* may be against its property." 180 U.S. at 53. (Author's italics.)

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*The *Eugene F. Moran*, 212 U.S. 466, 474 (1909).

4. When a statute limits civil liability, the vessel is not liable *in rem*.

In *The City of Norwich*, 118 U.S. 468 (1886), and in *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249 (1943), where the owner's liability was limited by statute, the Court declined to permit action *in rem* against the vessel to defeat the limitation which had been granted to the shipowner.

5. The vessel may not be condemned where the owner is the stevedore-employer protected by the Longshoremen's and Harbor Workers' Compensation Act.

In at least three cases United States Courts of Appeal have declined to permit an injured longshoreman to proceed *in rem* against the vessel on which he was working where that vessel was owned by the employer who had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1952), and whose liability was thus exclusively that provided by the Act. These cases are *Samuels* v. *Munson S.S. Line, Inc.*, 63 F. 2d 861 (5th Cir. 1933); *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3d Cir. 1952); *cert. denied*, 345 U.S. 908 (1953); *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam*, 254 F. 2d 138 (2d Cir.); *cert. denied*, 358 U.S. 817 (1958). All of these cases express the view that to permit condemnation of the vessel *in rem* at the suit of the owner's longshoreman-employee would deprive the shipowner of the limited liability provided by the Act, since collection of damages out of the ship is only an indirect way of collecting those damages from the owner.

In the instant case application of the teachings of the "personification" decisions is clear.

The owner is not liable at all, because the ship was seaworthy when delivered to the demisee. The demisee, having made his compensation payments, is not further liable. Should petitioner nevertheless be permitted an additional recovery from the ship as a *res*, the loss will necessarily fall upon the owner, a party who was not liable at all *in personam*, or upon one whose *in personam* liability has been limited and satisfied by a validly applicable Compensation Act (the demisee-employer).

If it be said that the general owner, by letting his vessel into the stream of commerce by demise, has voluntarily risked the value of the vessel as his stake in the enterprise and subjected her to respond to whatever claims may arise against her, we submit that he exposes it only to valid claims against the demisee, limited in amount to no more than the demisee might be called upon to respond to *in personam*. In *The Western Maid*, 257 U.S. 419 (1922), two of the vessels were demised to the United States and were in the possession of the United States when the acts occurred which as to a private party would otherwise have been torts. Yet, even as to those vessels, this Court refused to permit *in rem* responsibility after they had been returned to their general owners. The sovereign immunity which protected the vessel owned by the United States extended also, the Court held, to vessels demised to it. The principle is plainly applicable to the instant case: the demisee's quasi-immunity under the Compensation Act extended to the demised vessel.

In the light of the legal background discussed above,* the Second Circuit held in the first *Grillea* decision (*Grillea* v. *United States*, 229 F. 2d 687 (2d Cir. 1956)) that a vessel owner was not liable to a longshoreman for injury

*Except *Bennett* v. *The Normacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam* 254 F. 2d 138 (2d Cir.), *cert. denied* 358 U.S. 817 (1958), which was not yet decided.

resulting from an unseaworthy condition which arose after the vessel had been demised. The suit was brought under the Suits in Admiralty Act (46 U.S.C. §§ 741-752 (1952)) and *in rem* jurisdiction was denied because the Court felt that the libelant had not elected to proceed on principles of libels *in rem* (46 U.S.C. § 743 (1952)).

On rehearing, in the second *Grillea* decision (*Grillea* v. *United States*, 232 F. 2d 919 (2d Cir. 1956)), the Court was persuaded that an election sufficient to proceed as though *in rem* had been made. In a two-to-one decision the Court held that, although neither the United States (shipowner) nor any jural person was liable *in personam* (the employer-demisee being liable only for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1952)), liability on principles of libels *in rem* did exist. Judge Learned Hand, writing for the majority (232 F. 2d, at 924), said:

> "So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'."*

At the close of his opinion Judge Hand referred to an indemnity clause in the charter. He apparently felt that the existence of such a clause justified the result reached. Several Courts have commented upon the significance, or lack of it, of the indemnity clause in the charter involved in *Grillea*. In any event, the Second Circuit, despite the second *Grillea* opinion, now declines to permit *in rem* lia-

*It is this principle in *Grillea* which the First Circuit labeled "novel" (R. 27; 290 F. 2d, at 815), not the principle of *in rem* liability for unseaworthiness in a proper case. See also *Vitovi* v. *S.S. Platano*, 1950 A.M.C. 1686 (S.D. N.Y. 1948) (not officially reported).

bility of the vessel to an injured person where there was no *in personam* liability of anyone not covered by a compensation statute. *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam*, 254 F. 2d 138 (2d Cir.); *cert. denied*, 358 U.S. 817 (1958). *Pedersen* v. *Tanker Bulklube*, 170 F. Supp. 462 (E.D. N.Y. 1959); affd. *per curiam*, 274 F. 2d 824 (2d Cir.); *cert. denied*, 364 U.S. 814 (1960).

In the *Pedersen* case an employee of Todd Shipyards Corporation was injured upon the collapse of a staging welded high up on the inside of the BULKLUBE, when the bracket supporting one end of the staging collapsed because improperly constructed. At the time of the injury the BULKLUBE was withdrawn from commerce and undergoing extensive repairs at Todd Shipyards Corporation, which controlled the vessel. Pedersen libeled the BULKLUBE. National Bulk Carriers claimed the vessel as owner and defended in her behalf. Pedersen made no claim grounded upon a warranty of seaworthiness, because the vessel was withdrawn from commerce and undergoing extensive internal repairs. The cause of action was based upon the vessel's liability *in rem* resulting from the failure of National Bulk Carriers to provide a safe place to work and upon the liability of the vessel herself to libelant as a business guest for the tort of anyone in lawful possession. The Court held that, in the absence of a warranty of seaworthiness, the duty to supply a safe place to work was no more than a duty to use due care in that direction, and that, since the vessel was completely in the control of Todd, National Bulk Carriers could not be held for failure to furnish a safe place to work. There was consequently no lien arising from the breach of that claimed duty. The Court also held that the vessel was not liable *in rem* for the negligence of Todd, who had the lawful control but whose liability was circumscribed by the Longshoremen's

and Harbor Workers' Compensation Act. After pointing out that in *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957; affd. on opinion below, 254 F. 2d 138 (2d Cir. 1958); *cert. denied*, 358 U.S. 817 (1958)), the vessel was not liable *in rem* to a longshoreman-employee of the vessel's owner who was protected by the Compensation Act, the Court said:

> "In any event, it would be strange logic to hold that a vessel, owned by one who might be otherwise liable in tort but who is within the protection of the Compensation Act, cannot be reached in a proceeding *in rem*, and at the same time to hold, as libellant urges here, that a vessel owned by a wholly innocent third party can be held liable where, as here, there is no contract of indemnity, and the negligence causing the injury is solely attributable to the employer protected by the Compensation Act."

In *Noel* v. *Isbrandtsen Co.*, 287 F. 2d 783 (4th Cir. 1961), the ship WILLIAM BEVAN was owned by the United States and demised to Isbrandtsen Company. A surveyor, engaged by Isbrandtsen Company to represent its interest in an off-hire survey, was injured when a batten clip on the side of the vessel, which the surveyor was using as a hand-hold, broke because defective. The libelant sought recovery against the United States as owner and Isbrandtsen Company as charterer on grounds of negligence and on grounds of unseaworthiness, and also sought recourse against the vessel on the theory of the ship's responsibility to libelant for the injury (apart from her own unseaworthiness or the negligence of any person). Here again, as in *Pedersen, supra*, the issue of personification was squarely in the case.

It was held that there was no sufficient evidence of negligence, because inspection would probably not have disclosed the defect. It was likewise held that there could be no warranty of seaworthiness, since the vessel was completely withdrawn from commerce, was a dead ship and was well advanced in preparations for laying up. The Court then held that the ship should not be held *in rem* "as an absolute insurer for personal injury where there has been no violation of any warranty of seaworthiness and it is not established that anyone connected with her has been at fault."

Two District Court cases, both decided in 1960, have achieved the result of the second *Grillea* opinion. They are *Reed* v. *The Yaka*, 183 F. Supp. 69 (E.D. Pa. 1960),* and *Leotta* v. *The Esparta*, 188 F. Supp. 168 (S.D. N.Y. 1960).

In *Reed* v. *The Yaka* the vessel was demised (under a charter including an indemnity clause) to the longshoreman's employer. The Court found that the longshoreman was injured by unseaworthiness arising after the demise, and that the indemnity clause was not controlling. The opinion holds the characterization of the demisee as owner *pro hac vice* to be of no great significance. The Court apparently felt that, because the owner was going to get the ship back at some future time, the action *in rem* was really as much against the owner, who was not protected by the Compensation Act, as it was against the demisee-stevedore, who was so protected. That discussion begs the question, for in *Reed*, as here, the general owner out of possession was not responsible *in personam* for unseaworthiness arising after the demise. In *Reed* the District Court cited *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), as authority for the statement that—

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*Reed v. The Yaka is presently on appeal in the Third Circuit (Nos. 13,600 and 13,601) and was argued on December 18, 1961.

"The law is settled that where a stevedore [longshoreman] is injured as a result of unseaworthiness which arose after the real owner surrendered control to a bareboat charterer who is not the stevedore's [longshoreman's] employer, the stevedore [longshoreman] can still recover in an action *in rem* against the ship."

As we have already discussed (*supra*, pp. 8-9), *Crumady* did not involve a demise. The charter was a time charter and the owner remained responsible for unseaworthiness at the time of Crumady's injury.

In *Leotta* v. *The Esparta* the injured longshoreman libeled the ESPARTA *in rem* and her owner and demisee *in personam*. Libelant was employed by the demisee, which did its own stevedoring. The owner was not served and did not appear. The case came up on exceptions by the ESPARTA and the demisee on the ground that the demisee's liability was limited by the Longshoremen's and Harbor Workers' Compensation Act and that recovery against the ship would be a violation of that limited liability. It was assumed that the unseaworthiness complained of arose after the demise. The Court followed the second *Grillea* case and *Reed* v. *The Yaka*. It appears to have ignored the proposition that the general owner would not be liable at all *in personam*; for it said:

"The demisee is owner pro hac vice but only pro hac vice. The shipowner is always there in the background. If the longshoreman is given a lien on the ship for damage caused by its unseaworthiness, even though that unseaworthiness arises after the demise, that lien will burden the interest of the owner as well as the interest of the demisee." (188 F. Supp. at 169.)

Here again the Court evades the issue, which is whether the longshoreman can validly proceed against property of an owner who would not be liable *in personam*. That was the real issue in *Leotta* as it was in *Reed* v. *The Yaka*. Merely to say that the lien exists is, we submit, not enough. The principles of *in rem* liability as enunciated by this Court for almost a century join with the clear wording of a valid statute to compel a disavowal of second *Grillea's* unfortunate language and the confusion it has spawned. The owner is not liable *in personam;* the demisee has seen to his compensation payments, his exclusive liability; the vessel is not subject to suit.

IV. The bond to release M/V Caribe from arrest.

It will be noted that, because of its conclusion that the judgment of the District Court should be vacated, the Court of Appeals did not reach contentions of the respondent other than those discussed in the opinion below (R. 27; 290 F. 2d, at 816). One of the contentions not reached concerned the effect of the bond given to release the vessel. Respondent filed claim to the vessel in the form of a motion (R. 4-5). He filed with the motion a bond in the amount of $20,000 for discharge of the Caribe from arrest (R. 5-6). The motion was consented to and the discharge was ordered by the District Judge (R. 5).

In his capacity as claimant of the Caribe, respondent argued below that, if the Caribe were subjected to *in rem* liability to the petitioner, that liability could not exceed $20,000, the amount of the bond or stipulation for value, which takes the place of the *res* for all subsequent purposes. This matter was fully discussed by Judge Woolsey in the Southern District of New York in *J. K. Welding Co., Inc.*, v. *Gotham Marine Corp.*, 47 F. 2d 332 (S.D.

N.Y. 1931). See also *United States* v. *Ames*, 99 U.S. 35, 41 (1878).

No question is before this Court on the instant writ of certiorari as to the quantum of *in rem* liability. The District Judge decreed that petitioner recover from the CARIB and the personal respondent the sum of $30,000, together with interest, costs and disbursements to be taxed (R. 21-22). If this Court decides that there is *in rem* liability, the decree of the District Judge, so far as it affects the ship *in rem*, cannot be reinstated without a decision on this question.

Conclusion.

Respondent submits that the judgment of the Court of Appeals vacating the judgment of the District Court and remanding the cause for entry of judgment of dismissal should be affirmed. In the event that this Court decides that *in rem* liability of the CARIB exists, the cause should be remanded to the Court of Appeals for determination of the amount of that liability.

Respectfully submitted,

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